Liability for negotiations

Babusiaux, Ulrike

COMMENTARIES ON EUROPEAN CONTRACT LAWS

EDITED BY
NILS JANSEN
REINHARD ZIMMERMANN

OXFORD

Section 3: Liability for Negotiations

Literature:

Negotiations Contrary to Good Faith: S Banakas, 'Liability for Contractual Negotiations in English Law: Looking for the Litmus Test', (2009) 1 *InDret. Revista para el análisis del derecho* 1–21; J Cartwright and M Hesselink (eds), *Precontractual Liability in European Private Law*, (2008); B de Coninck, 'Le droit commun de la rupture des négociations précontractuelles', in M Fontaine (ed), *Le processus de formation du contrat: Contributions comparatives et interdisciplinaires à l'harmonisation du droit européen* (2002) 17–137; D Deroussin, '*Culpa in contrahendo:* L'indemnisation en cas d'annulation du contrat, du droit romain à la théorie classique des nullités', (2004) 82 *Revue historique de droit français et étranger* 189–222; EA Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations', (1987) 87 *Columbia LR* 217–94; P Giliker, *Pre-contractual Liability in English and French Law* (2002); EH Hondius (ed), *Precontractual Liability: Reports to the XIIIth Congress: International Academy of Comparative Law*. Montreal, Canada 18–24 August 1990 (1991); F Kessler and E Fine, '*Culpa in contrahendo*, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study', (1964) 77 *Harvard LR* 401–49; M Lehmann, 'Die Zukunft der cic im Europäischen Privatrecht', (2009) 17 *ZEuP* 693–715; BS Markesinis, H Unberath, and A Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, 2006); F Procchi, *'Licet emptio non teneat'. Alle origini delle moderne teoriche sulla cd. 'culpa in contrahendo'* (2012); S van Erp, 'A European 'culpa in contrahendo' doctrine? Towards a model of contract as a legal relationship and situation-specific duties to inform', in S Espiau Espiau and A Vaquer Aloy (eds), *Bases de un derecho contractual europeo: Bases of European Contract Law* (2003) 67–77; JHM van Erp, 'The Pre-contractual Stage', in Hartkamp, Hesselink, Hondius, Mak, and Du Perron, *European Civil Code* 493–515; R Zimmermann and S Whittaker, 'Coming to terms with good faith', in S Whittaker and R Zimmermann (eds), *Good Faith in European Contract Law* (2000) 653–701.

Breach of Confidentiality: J Cartwright and M Hesselink (eds), *Precontractual Liability in European Private Law* (2008); GE Dal Pont, *Law of Confidentiality* (2015); F Gurry, *Breach of Confidence* (1984); P Kurz, *Vertraulichkeitsvereinbarungen*, (3rd edn, 2013); J Lendenmann, 'The Parties' Confidentiality Obligations and their Enforcement in International Commercial Arbitration', in *Series on International Arbitration: Selected Papers on International Arbitration*, vol 3 (2013) 123–62; IM Smeureanu, *Confidentiality in International Commercial Arbitration* (2011); C von Bar (ed), *Principles of European Law: Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab Dam)* (2009).

Introduction before Art 2:301

I. History

Terminology. The Latin phrase *culpa in contrahendo* literally means 'fault in the conclusion of a contract'. The term was coined in the medieval *glossa ordinaria* on the Justinianic *Corpus iuris civilis*,[1] but the honour of its invention is mainly attributed to the German scholar Rudolf von Jhering, who was the first to apply the wording to situations of pre-contractual liability.[2] He stated that the parties to a contract were under a duty to negotiate according to good faith. Since the 19th century, the phrase has been used within civil law jurisdictions to cover a variety of situations arising in the pre-contractual phase, essentially involving failure to disclose reasons for the voidness or illegality of a contract to the other party. Due to the reluctance of the common law to recognize a general principle of good faith,[3] the use of the term in European private law is restricted to the special case of breaking-off negotiations against good faith and fair dealing (below, Art 2:301, [1]). 1

The problem of good faith and fair dealing in Roman law. Despite the Latin wording, the concept of *culpa in contrahendo* was unfamiliar to ancient Roman law. The absence of pre-contractual liability derived from the fact that Roman jurists did not reason about the formation of contracts. That is to say, the starting point for legal reasoning, at least in consensual contracts, was not the declaration of intention of each party, but the agreement between the parties (*consensus*).[4] Thus, where the will of one or both parties 'was lacking the necessary direction' the contract was void without further questioning the origin of the party's mistake.[5] In the law of sale, however, the seller was liable for express declarations or promises about the object (*dicta et promissa*);[6] for fraudulent concealment of defects in the object; and for express warranties in stipulation.[7] Besides, since the time of Hadrian, the Roman jurists allowed the buyer to found a claim on the contract of sale (*actio empti*) if the vendor had (positively) known about the defects or lack of title.[8] This extension of contractual liability resulted from the application of the criterion of good faith inherent to the contract of sale.[9] Tortious liability was not available in these cases due to the restrictions of the claim for property damage: *damnum iniuria datum* in the *lex Aquilia*[10] did not cover pure economic loss, while the tortious claim for deliberate 2

[1] D 14.3.1 ... *sed et plus possunt conveniri, si fuerint in culpa in contrahendo, si modo sint solvendo*, on which see A Bürge, *Römisches Privatrecht: Rechtsdenken und gesellschaftliche Verankerung: Eine Einführung* (1999) 213 f, fn 26.

[2] For further explanations see T Giaro, '*Culpa in contrahendo*: Eine Geschichte der Wiederentdeckungen', in U Falk and H Mohnhaupt (eds), *Das Bürgerliche Gesetzbuch und seine Richter: Zur Reaktion der Rechtsprechung auf die Kodifikation des deutschen Privatrechts* (2000) 113–54, 114–18; *HKK*/Harke, § 311 II, III, [5]–[7]. The last comprehensive study is Procchi, *Licet emptio non teneat*, 5–17.

[3] See G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', (1998) 61 *MLR* 11–32.

[4] See MJ Schermaier, 'Auslegung und Konsensbestimmung: Sachmängelhaftung, Irrtum und anfängliche Unmöglichkeit nach römischem Kaufrecht', (1998) 115 *ZSS (RA)* 235–88, 248, 279 f.

[5] For an overview on *error* see Zimmermann, *Obligations*, 587–96; for remedies against *dolus, metus*, and *fraud*, id 651–8.

[6] Liability for these promises derived from the Aedilician edict, on which see É Jakab, *Praedicere und cavere beim Marktkauf: Sachmängel im griechischen und römischen Recht* (1997).

[7] On all these see F Schulz, *Classical Roman Law* (1951) 925.

[8] The main text is D 19.1.30.1.1. This further development is attributed to the jurist Salvius Julian, see MJ Schermaier, 'Bona fides in Roman contract law', in Zimmermann and Whittaker, *Good faith*, 85 f.

[9] On the role of good faith (*bona fides*) in Roman law see Schermaier (fn 8) in Whittaker and Zimmermann, *Good faith*, 63–92, especially 67 f.

[10] On the *lex Aquilia* see the survey in Zimmermann, *Obligations*, 953–1017.

deceit (*actio de dolo malo*) only allowed recovery of pure economic loss where there had been intentional harm.[11]

3 **Medieval extensions of liability.** The medieval commentators on the Justinianic compilation widened the scope of the *lex Aquilia* and established a general tortious liability for fault (*culpa*) that allowed compensation for any harm, including pure economic loss.[12] This development provided the basis for liability within the pre-contractual stage. The tendency to allow tortious liability for negotiations conducted in bad faith was intensified in legal humanism, whose scholars tried to strengthen the purchaser's protection by establishing liability for the presumed fault of the vendor.[13] The *usus modernus pandectarum* unified these approaches, and the Natural Law doctrine (Grotius) was the first to apply tortious liability (*ex lege Aquilia*) if the contract of sale was invalid because of an error of the buyer which had been negligently induced by the vendor.[14] More generally, Jean Domat and Robert Joseph Pothier held the contracting parties liable if a contract was void for a cause that was due to the imprudence of one party.[15] However, the 19th-century German historical school of jurisprudence led by Friedrich Carl von Savigny argued for a more restrictive scope of tortious liability. Its adherents challenged the medieval and modern extension of the *lex Aquilia* by going back to a specific list of protected rights and interests, such as property, life, liberty, and health. The motivation behind this restrictive view was not only a concern for historical authenticity, ie renewing 'classical Roman law', but an argument of legal policy. The protagonists of the historical school stated that the broad application of a general tortious liability would lead to an increase in claims and hinder economic development (*Verkehrsschutz*).[16] This claim even led to a restrictive interpretation of existing statutes (the most important of which was the ALR) that envisaged liability of parties within the pre-contractual phase.[17]

4 **Jhering's invention.** The pandectists' resistance against pre-contractual liability can *inter alia* be explained by their new approach to the formation of contract. Contract was indeed analysed by Friedrich Carl von Savigny as the coincidence of two separate declarations of intention (*Willenserklärung*).[18] This new understanding of contract led to a controversy about the predominance of either the will or the declaration. Since von Savigny argued for the will, this approach led to an increasing number of void contracts, whenever the will was vitiated by a (unilateral) error. Jhering's (1861) main concern[19] was to compensate the party who had relied on the void contract for the loss incurred.[20] According to the pandectists' doctrine, in this case, contractual liability did not arise without the requisite valid contract, while tortious liability was unavailable for pure economic loss. Moreover, the general action for fraud (*actio de dolo*) was only available

[11] See R Jhering, 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen', (1861) 4 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1–112, 24 f.

[12] For the medieval development see N Jansen, *Die Struktur des Haftungsrechts* (2003) 272–88; on the *usus modernus legis Aquiliae* see Zimmermann, *Obligations*, 1017–31; on the development under Natural law see id, *Obligations*, 1032–40.

[13] See Procchi, *Licet emptio non teneat*, 57–87.

[14] On the humanists and Natural law schools see Procchi, *Licet emptio non teneat*, 90–149 and 120–39.

[15] On Jean Domat and Robert Joseph Pothier see Procchi, *Licet emptio non teneat*, 139–49.

[16] Zimmermann, *Obligations*, 1037 f with further references.

[17] See PrALR I 5 § 284, on which see N Jansen, 'Developing legal doctrine: Fault in the German law of delict', in id (ed), *The Development and Making of Legal Doctrine* (2010) 96–125, 100–3.

[18] On this functional explanation of Jhering's theory see Kessler and Fine, 'Culpa in contrahendo', 402.

[19] Jhering (fn 11); on Jhering in English see: F Procchi, 'Roman Contracts and the Construction of Fault in Their Formation', in AJ McGinn (ed), *Obligations in Roman Law: Past, present and future* (2012) 76–101.

[20] Jhering (fn 11) 2.

if the party had acted with intent, but not if the mistake was due to negligence of the mistaken party.[21] For Jhering, the absence of any legal protection of the party who had relied on the validity of the contract was contrary to equity and good faith. As a remedy, he established liability for negligent conduct during negotiations, especially in situations where the negligent party could avoid the contract because of an error. This liability was based on fragments from the Digest dealing with the liability incurred by the vendor of a sacred object (*res sacra*).[22] Although the sale of a *res sacra* is void, these texts grant a contractual claim (on the sale), or a factual action similar to sale (*actio in factum*), if the buyer was unaware of the special character of the object. Jhering inferred the rule that all contracting parties are bound to avoid negligent or culpable conduct during the process of contracting.[23]

Faggella. Jhering's invention[24] was widely discussed and spread to other civil law countries. 5
Important amendments were made by the Italian judge Gabriele Faggella (1906) and by the French scholar Raymond Saleilles (1907). Faggella distinguished three different pre-contractual periods (*periodi precontrattuali*).[25] He reconsidered the process of the formation of the contract via offer and acceptance, establishing a general pre-contractual period of legal relevance.[26] This led to an extension of the liability, since Faggella held that a party could be found liable due to a sudden termination of the pre-contractual phase, even before the (formal) issue of the offer.[27] The basis of this liability was the (general) consensus to be contracting parties, which Faggella qualified as 'pre-contractual' consensus,[28] meaning that the parties agreed to be in a contracting state of mind. For Faggella, the basis of this liability was therefore parallel to contractual liability, which meant that it was founded on good faith.

Saleilles. Another new aspect was introduced into this discussion by Raymond Saleilles, who 6
integrated Jhering's findings into the structure of the French Civil code and dealt with it as tortious liability. For the French scholar, the fact that the parties had entered negotiations created a situation of mutual dependence.[29] His main argument was that the negotiation of a contract was to be seen as a juridical fact (*fait juridique*), ie an event that was likely to produce legal effects, but not a juridical act (*acte juridique*), ie an intentional declaration of the parties with a view to creating legal effects.[30] Thus, on the one hand, the parties were free to end the negotiations, but, on the other hand, a failure to respect the juridical fact could incur liability. Like Faggella, Saleilles dealt mainly with breaking-off negotiations against good faith. While he stressed the right of the parties to retreat from negotiations at any time, he claimed that, exceptionally, their retreat might be regarded as a tortious wrong, if it could be assimilated to

[21] For a comprehensive analysis see P Lambrini, *Studi sull'azione de dolo* (2013) 121–36.

[22] See D 18.1.62.1; Ulp D 11.7.8.1.

[23] Jhering (fn 11) 3. The author referred to H Richelmann, *Der Einfluß des Irrthums auf Verträge: Ein civilistischer Versuch* (1837) 129 f.

[24] For a recent overview on the reactions see I Fargnoli, '"Culpa in contrahendo" e azioni contrattuali', in L Garofalò, *'Actio in rem' e 'actio in personam: in ricordo di Mario Talamanca'*, vol II (2011) 437–80, 444–52.

[25] G Faggella, 'Dei periodi precontrattuali e della loro vera ed esatta costruzione scientifica', in L Pierro (ed), *Studi giuridici in onore di Carlo Fadda pel XXV anno del suo insegnamento*, vol III (1906) 269–342.

[26] Faggella (fn 25) 297–301.

[27] Faggella (fn 25) 302 f.

[28] Faggella (fn 25) 302–4; see also R Saleilles, 'De la responsabilité précontractuelle—à propos d'une étude nouvelle sur la matière', (1907) 3 *Revue trimestrielle de droit civil* 697–754, 702 f.

[29] Saleilles (fn 28) 741.

[30] The theory of *acte juridique* is derived from the German *Rechtsgeschäftslehre*, see Ranieri, *Obligationenrecht*, 127–51.

an abuse of rights.[31] Therefore, according to Saleilles, the party who is breaking off negotiations will be held liable if the circumstances of the retreat qualify his behaviour as contrary to good faith.[32] In contrast to Faggella, Saleilles accepted liability only in cases where there had already been an offer. On this view, pre-contractual liability was a counterpart to the contemporaneous French law that allowed the revocation of the offer until the moment of acceptance.[33]

II. Comparative observations

1. Scope of protection

7 **Reliance interest and expectation interest.** Jhering's aforementioned study on *culpa in contrahendo* (above, [4]) was also ground-breaking as regards the measurement of compensation. Jhering observed that, in the Roman sources, the buyer of an inheritance was granted compensation on the basis of the expectation interest if the inheritance did not belong to the vendor. However, the buyer was only entitled to the reliance interest if the inheritance simply did not exist.[34] Jhering therefore distinguished the positive interest from the negative interest:[35] while the positive interest covered the benefits that would have accrued to the purchaser had the contract been valid, the negative interest looked to the situation the purchaser would have been in if the contract had not been concluded.[36] This difference was further explained by Fuller and Perdue[37] who distinguished three principal purposes which may be pursued in awarding contract damages: 'First, the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant.' This is called 'the restitution interest'. 'Secondly, the plaintiff has in reliance on the promise of the defendant changed his position', the 'reliance interest'. 'Thirdly, ... we may seek to give the promisee the value of the expectancy which the promise created', ie the 'expectation interest'.[38] In accordance with Jhering, they stressed that the reliance interest might be 'a compromise between no enforcement and complete but too onerous enforcement of the promise' and that American case law showed that the reliance interest was used as 'a kind of midway station between no contract and a "complete" contract'.[39]

8 **Convergences between civil law and common law.** The analysis of the common law by Fuller and Perdue (above, [7]) coincides with the tendency of most civil law jurisdictions that accept pre-contractual liability, to grant only the reliance interest in case of negotiations in bad faith. Dutch law seems to have been a notable exception. In *Plas v Valburg*,[40] the Hoge Raad ruled that 'it is not impossible that negotiations concerning a contract may

[31] Saleilles (fn 28) 742.

[32] On the distinction of fault and abuse of rights A Tenenbaum, 'Terminology', in Fauvarque-Cosson and Mazeaud, *European Contract Law*, 190–4.

[33] Saleilles (fn 28) 743–51.

[34] D 18.4.8; Paulus D 18.4.9.

[35] Jhering (fn 11) 10.

[36] Jhering (fn 11) 16 f.

[37] LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale LJ* 52–96.

[38] Fuller and Perdue (fn 37) 53.

[39] Fuller and Perdue (fn 37) 86.

[40] *Plas v Valburg*, HR, (1983) *NJ* 723 (18.06.1982) (annotated by CJH Brunner); see JM van Dunné, 'Netherlands', in Hondius, *Precontractual Liability*, 223–37, 230 f.

reach such an advanced stage that the act of breaking off must in itself be regarded, in the prevailing circumstances, as a breach of good faith, on the basis that the parties may be assumed mutually to have relied on the expectation that some sort of contract would in any event result from the negotiations.'[41] This decision has been interpreted as meaning that, if a party breaks off negotiations at a stage where the parties believed that the contract would be concluded, the liability may even amount to the expectation interest.[42] More recent case law in the Netherlands, however, seems to show a tendency to restrict pre-contractual liability in all cases to the reliance interest.[43]

Tort or contract? From the very beginning, there has been an important difference amongst civil law countries in the foundation of pre-contractual liability. Jhering's argument implied that it was based on contractual liability, since the Roman jurists had granted the contractual action in such situations, despite the voidness of the contract (above, [2]). Due to the limitations of tortious liability in 19th-century German doctrine, liability was founded on the imminence or the appearance of a contract.[44] This foundation was in contrast to the medieval doctrine that had applied tortious liability,[45] a tradition that had been codified in Art 1382 *Code civil*[1804] (= Art 1240 *Code civil*).[46] Already in 1883, the Court of Appeal in Paris held that 'the fallacious promise to consent to a contract can, without obliging the promisor contractually, constitute a fault in tort'.[47] Even if there had been a discussion in French law as to whether good faith could be an autonomous foundation of the liability (Art 1134 *Code civil*[1804]),[48] the French doctrine and the French courts finally stuck to tort law.[49] The function of this pre-contractual liability is to counter-balance the right freely to withdraw an offer (*révocabilité de l'offre*), and the consequences of the theory of annulment for *vices des consentement*.[50] In fact, the defendant will be held liable if his negligence has caused the other to believe in the formation or in the validity of a contract that ultimately does not come into existence.[51] Both divergent traditions, ie the classifications as either contractual or tortious liability, comprise the European tradition, which explains the nuanced solution of European Union law: Art 12 of

9

[41] 'HR 18 June 1982 Plas v Valburg', in Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.21 (NL)]. On the Dutch model see also Van Erp, 'Pre-contractual Stage', 506 f.

[42] 'HR 18 June 1982' (fn 41) in Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.21 (NL)].

[43] *CBB v JPO Projecten*, HR, (2005) *NJ* 467 (12.08.2005), on which see C Bollen, 'Enforcement of the duty to carry on negotiations: (Should it be) a possibility in Europe or not?', in J Smits, D Haas, and G Hesen, *Specific Performance in Contract Law: National and Other Perspectives* (2008) 231–51, 233.

[44] Jhering (fn 11) 28 f, 33 f and 36 f with reference to Ulp D 19.1.13.3; also Jhering (fn 11) 41, 43 and 88 f.

[45] Procchi, *Licet emptio non teneat*, 364 f; Deroussin, 'Culpa in contrahendo', 220 f.

[46] Deroussin, 'Culpa in contrahendo', 189–222, 212 f. Usually, French academic doctrine takes the decision by the *Cour de cassation* in 1972 as starting point, see O Deshayes, 'Le dommage précontractuel', (2004) *Revue trimestrielle de droit commercial et économique*, 187–204, 187 fn 2; Y-M Serinet, 'Le contrat—le consentement', in J Ghestin, G Loiseau, and Y-M Serinet, *Traité de droit civil: La formation du contrat*, vol I (4th edn, 2013) 530–4, [731]–[738].

[47] CA Paris, 13 February 1883, Gaz Pal 1883, II, 414; see J Schmidt, 'La sanction de la faute précontractuelle', (1974) 72 *Revue trimestrielle de droit civil* 46–73, 51 for further references.

[48] Deroussin, 'Culpa in contrahendo', 215 f and 220 f; see also the Art 1104 *Code civil*.

[49] See Procchi, *Licet emptio non teneat*, 371–5 on Saleilles' role. On 'faute' see A Bürge, *Das französische Privatrecht im 19. Jahrhundert* (2nd edn, 1995) 402–10; J-L Halpérin, 'French doctrinal writing', in N Jansen, *The Development and Making of Legal Doctrine*, vol VI (2010) 96–125, 73–95, 75 f.

[50] R Nirk, 'Rechtsvergleichendes zur *culpa in contrahendo*', (1953) 18 *RabelsZ* 310–55, 325; Procchi, *Licet emptio non teneat*, 366–9.

[51] See Procchi, *Licet emptio non teneat*, 369. For decisions see Cass com, 00–10243; 00–10949, Bull civ IV 2003, No 186 (26.11.2003) 206, on which see Ghestin, Loiseau, and Serinet (fn 46) 546–55 [757]–[769].

the Rome II Regulation applies the law of the country that would apply to the contract,[52] while the conditions of the claim are ruled by tort law.[53]

2. Case law in different jurisdictions

10 **German-speaking countries.** Important differences can be observed in the application of pre-contractual liability in different civil law countries. The most extensive scope is achieved in the German-speaking countries, which use the term of *culpa in contrahendo* even beyond Jhering's intentions for any harm that may occur during the pre-contractual phase.[54] This covers protection for each other's physical integrity, personal property, and duties of disclosure.[55] The main causes of this resort to contract law are deficiencies in the law of torts: the German law of torts covers only injuries to absolute (property) rights and has weaknesses with regard to liability for third parties and pure economic loss.[56] Still significant is the leading 'linoleum carpet case' (*Linoleumrollenfall*) decided by the *Reichsgericht* in 1911.[57] The female claimant, accompanied by her child, had gone to a warehouse in order to choose a rug of linoleum. When the employee of the shop lifted two rolls of linoleum, another roll fell and hurt both the woman and the child. Although the incident prevented the claimant from buying the carpet, the *Reichsgericht* applied contractual liability to the woman's situation, since the parties were in a situation of contractual negotiation. Indeed, if the court had applied tort law, the owner of the shop could have avoided liability for the negligence of the employee by proving that he himself had carefully selected and supervised the employee (§ 831 BGB). It was only under contractual liability that the employer could be held liable for any fault or negligence of the employee (§ 278 BGB).[58] From this decision onwards, German courts and doctrine have assumed that negotiating parties are in a relationship similar to a contractual one. If they fail to respect the other party's legitimate expectations and interests, contractual liability will apply.[59] This general obligation includes liability for the 'creation of the expectation that a contract will come into existence',[60] but the bulk of case law relates to pre-contractual

[52] N Hage-Chahine, 'Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation', (2012) 32 *Northwestern Journal of International Law & Business* 451–540, 461 f. The leading case is ECJ, 17.09.2002—C-334/00, *Fonderie Officine Meccaniche Tacconi SpA/Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, 2002 ECR, I-7357, I-7396.

[53] This distinction stems from the French tradition, see J Ghestin, 'La responsabilité contractuelle pour rupture des pourparlers', in J-S Borghetti, O Deshayes, and C Pérès (eds), *Etudes offertes à Geneviève Viney* (2008) 455–65 and id, 'La responsabilité délictuelle pour rupture abusive des pourparlers', (2007) *La Semaine Juridique édition générale*, 155, 15–21.

[54] Giaro (fn 2) 137–9. Similarly, for Austria, see W Posch, 'Austria', in Hondius, *Precontractual Liability*, 43–52, 48 f. For Switzerland see BGE 39 II 227 (26.04.1913); 41 II 95, 101 E.2 (11.02.1915); 49 II 54, 67 E.4 (27.02.1923); 51 II 49, 54 (28.01.1925).

[55] Kessler and Fine, 'Culpa in contrahendo', 404 f; critically D Medicus, 'Zur Entdeckungsgeschichte der *culpa in contrahendo*', in *Iuris professio: Festgabe für Max Kaser* (1986) 169–81; Lehmann, 'Die Zukunft der cic', 693–715.

[56] See S Leible, 'Culpa in contrahendo', in O Remien (ed), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht: Zwischenbilanz und Perspektiven—Würzburger Tagung vom 27. und 28.10.2006* (2008) 219–43, 220 f; Lehmann, 'Die Zukunft der cic', 694 f.

[57] RGZ 78, 239–41, on which see Markesinis, Unberath, and Johnston, *German Contract Law*, 95 f and Giaro (fn 2) 135 f.

[58] On the differences between § 278 BGB and § 831 BGB see Markesinis, Unberath, and Johnston, *German Contract Law*, 95.

[59] Details on the development in doctrine and courts until 1939 in Giaro (fn 2) 142–9.

[60] RG 19 January 1934, RGZ 143, 219, on which see Kessler and Fine, 'Culpa in contrahendo', 404. Doubting Markesinis, Unberath, and Johnston, *German Contract Law*, 96.

duties with regard to property and personal rights of the other party. Despite its specific background in German tort law, this approach has been followed by Austrian[61] and Swiss legal practice.[62]

The French view. In legal systems that are influenced by French law,[63] *culpa in contrahendo* has a narrower scope than in the German-speaking countries. It covers the breaking off of negotiations in bad faith, which constitutes an abuse of the freedom of contract and a 'fault' in the sense of Art 1382 *Code civil*1804.[64] Since 1972 the *Cour de cassation* has broadened this liability by inferring that an abuse can also be seen in a negligent act of the withdrawing party, eg if one party breaks off negotiations that have advanced so far that the other party could believe in the formation of a contract, without any legitimate motivation (*motif légitime*)[65] or with 'blameworthy thoughtlessness' (*légèreté blâmable*).[66] 11

The common law resistance. In contrast to most civil law countries, the common law is opposed to a generalized concept of *culpa in contrahendo*. This is due to 'the aleatory view of the negotiations' and the 'concept of negotiating at arm's length', both of which exclude a duty to negotiate in good faith.[67] Besides, it has been argued that the duty to negotiate in good faith was too uncertain to be enforced.[68] In *Walford v Miles Ltd*,[69] the House of Lords held that it could not be up to the court to decide subjectively whether a proper reason for ending negotiations existed or not.[70] Since the common law does not acknowledge the existence of a special relationship during the pre-contractual phase, the legal remedies for situations covered by *culpa in contrahendo* in civil law countries are mainly outside the contractual sphere in the common law. In some cases of failed negotiations, an action may be based on unjust enrichment,[71] which allows the recovery of the loss of one party who has conferred a benefit to the other.[72] Another 12

[61] Leading cases are OGH 1 Ob 617/79 (30.05.1979), SZ 52/90 = *Justizblatt* 1980, 33 = *Der Gesellschafter* 1979, 175; 3 Ob 502/80 (28.01.1981); 1 Ob 3/83 (23.02.1983); 3 Ob 504/83 (13.04.1983); 8 Ob 581/87 (25.06.1987); 4 Ob 515/91 (28.05.1991); 4 Ob 571/95 (24.10.1995); 4 Ob 2292/96d (17.09.1996); 8 ObA 176/00s (13.07.2000); 2 Ob 160/06b (21.12.2006); 3 Ob 7/07m (31.01.2007).

[62] BGE 39 II 227 (26.04.1913); 41 II 95, 101 E.2 (11.02.1915); 49 II 54, 67 E.4 (27.02.1923); 51 II 49, 54 (28.01.1925).

[63] See also Art 197 and 198 of the Greek Civil Code, on which see G Arnokouros, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 37–42; similar also Art 1337 *Codice civile*, on which see A Musy, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 44–6.

[64] For Portugal see L Menezes Leitão, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 51 f; for Spain see F Hernanz, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 53 f.

[65] For an overview see de Coninck, 'Le droit commun', 22 f.

[66] Cass com, 91–18842, Bull civ IV 1994, No 79 (22.02.1994).

[67] Kessler and Fine, 'Culpa in contrahendo', 407, 409 speak of two opposing paradigms; Farnsworth, 'Precontractual Liability', 221; Lehmann, 'Die Zukunft der cic', 696; best overview in J Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (2nd edn, 2013) 71–90.

[68] Kessler and Fine, 'Culpa in contrahendo', 412 f (with an overview of the exceptions to the principle of certainty); Giliker, *Pre-contractual Liability*, 8–16. *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297, at 301.

[69] *Walford v Miles* [1992] 2 AC 128, on which see Banakas, 'Liability', 8–13; Van Erp, 'Pre-contractual Stage', 504 f.

[70] See Banakas, 'Liability', 8 f; Giliker, *Pre-contractual Liability*, 32–6. For 'best endeavours' see *Little v Courage* [1995] 70 P & CR 469, 475 ([1995] CLC 164); on which see Banakas, 'Liability', 11 f. *London and Regional Investments Ltd v TBI plc, Belfast International Airport Ltd* [2002] EWCA Civ 355, [38–40].

[71] For a general principle see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; in this context see Banakas, 'Liability', 15 f; J Cartwright, 'Case 4', in Cartwright and Hesselink, *Precontractual Liability*, 119 f.

[72] For an example see 'Case 9', in Cartwright and Hesselink, *Precontractual Liability*, 254–74. Markesinis, Unberath, and Johnston, *German Contract Law*, 102 referring to *British Steel Corporation v Cleveland Bridge Engineering Co Ltd* [1984] 1 All ER 504.

resort may be tortious liability, but until now, the courts have refused to apply the general tort of negligence.[73] This implies that the party who has incurred losses during negotiations may only get compensation on the ground of the tort of deceit, meaning that the claimant has to prove that the defendant made a false statement about his intentions to conclude the contract and that the claimant incurred losses because he relied on it.[74] Moreover, in recent years, there has been scholarly debate about broadening the role of promissory estoppel from 'a shield'[75] to 'a sword', but until now (in English law) promissory estoppel is only able to suspend rights, not to create new ones.[76]

III. Culpa in *contrahendo* in statutes and other legal texts

13 **National legislation on *culpa in contrahendo*.** As previously mentioned (above, [4]–[7]) *culpa in contrahendo* was a discovery of 19th-century legal doctrine mainly developed and shaped by jurisprudence. Legislation on the topic has, until recently, been relatively scarce, and covered only special applications of the principle. For example, the German BGB promulgated on 1 January 1900 contained some provisions that could be explained by Jhering's concept of pre-contractual liability.[77] The most visible influence, nowadays abolished, could be found in § 307 BGB, that provided for the (strict) liability of a party who had known about the reasons for the initial voidness of the contract.[78] A general norm of pre-contractual liability has been introduced in Italy in 1942. Apart from Art 1338 *Codice civile*, which obliges the party who knew about the invalidity of the contract to compensate the other party's damage incurred in reliance on the validity of the contract,[79] Art 1337 *Codice civile* states that 'the parties in the course of negotiations and in the formation of the contract must conduct themselves according to good faith'.[80] Since 2001, the most extensive provision can be found in the (modernized) BGB, where two special provisions attempt to codify the jurisprudential developments.[81] The situations covered by the new § 311 (2) BGB rank from a formal

[73] See Cartwright (fn 67) 176 f.

[74] For England see J Cartwright, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 24 f; for Ireland see R Friel, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 42–4; for Scotland see M Hogg and H MacQueen, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 52 f: 'fraudulent misrepresentation'.

[75] E Cooke, *The Modern Law of Estoppel* (2000) 119.

[76] Peel, *Treitel*, [3-086]–[3-088]. But see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 for the Australian position.

[77] The relevant provisions are § 122 BGB, § 179 (2) BGB, and § 307 BGB[1900], on all these see Medicus (fn 55) 175–8; in English: Markesinis, Unberath, and Johnston, *German Contract Law*, 94 f.

[78] See also Jhering (fn 11) 2; Kessler and Fine, 'Culpa in contrahendo', 403. On Jhering's influence on Italian law see Fargnoli (fn 24) 453 (on Art 1338); Giaro (fn 2) 126–30 (for scholarship), 130–4 (for the courts).

[79] Art 1338 Conoscenza delle cause d'invalidità: 'La parte che, conoscendo o dovendo conoscere l'esistenza di una causa d'invalidità del contratto (1418 e seguenti), non ne ha dato notizia all'altra parte è tenuta a risarcire il danno da questa risentito per avere confidato, senza sua colpa, nella validità del contratto (1308).'

[80] 'Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede (1366,1375,2208)', on which see G Alpa, 'Italy', in Hondius, *Precontractual Liability*, 197–204, 197; A Musy, 'Case 1', Cartwright and Hesselink, Precontractual Liability, 44–6.

[81] § 311 (2) BGB referring to 'Obligations created by legal transaction and obligations similar to legal transactions' states that 'an obligation with duties under § 241 (2) also comes into existence by 1st the commencement of contract negotiations, 2nd the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or 3rd similar business contacts' (official translation available online).

beginning of negotiations (1) to an informal initiation of negotiations (2) and even any similar contact between business relations.[82] This definition of the pre-contractual obligations between parties in negotiations suffices to create liability under reference to § 280 (1) BGB. However, even if *culpa in contrahendo* is now recognized by a German codification, the main task is still jurisprudential: given the general application of the code, the courts will need to define and confine the application of the principle.[83] The same observation applies to the new French law (Art 1112 *Code civil*) on the topic.[84]

Cross-border contracts: absence of the *culpa in contrahendo* within the CISG. Because of the scepticism of most common law countries, it has not been self-evident that an obligation to negotiate according to good faith and fair dealing would be included in international and transnational law texts. Indeed, the CISG did not contain rules on *culpa in contrahendo*, as, during the proceedings, the Anglo-American countries opposed an attempt by the (former) German Democratic Republic to include a duty to negotiate in good faith.[85] This is why CISG 7 (1) simply states, that 'in the interpretation of this Convention, regard is to be had to ... the observance of good faith in international trade.' Despite doctrinal views to the contrary,[86] the history of the Convention clearly indicates that the CISG does not include *culpa in contrahendo*. This view is corroborated by the argument that the objective liability within the CISG is opposed to the principle of fault that characterizes the institution of *culpa in contrahendo*.[87]

Application of national law in international sales? The application of national law to the question of *culpa in contrahendo* in international sales contracts governed by the CISG is problematic. The issue of pre-contractual liability for breaking off negotiations can be regarded as falling within the scope of the Convention. In fact, CISG 16 (2) provides that: 'an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.'[88] This nuanced position with regard to the binding force of the offer constitutes a compromise between the different national legal traditions. Therefore, as a commentator has put it, 'the difficult compromise in CISG 16 would be jeopardized if, by threatening damages claims under national law, it were possible to pressure the 15

[82] Leible (fn 56) 225.

[83] On the application of the new law see U Babusiaux, 'Die gesetzliche Rechtfertigung des richterlichen Vertragseingriffs' in P Jung (ed), *Europäisches Privatrecht in Vielfalt geeint: Richterliche Eingriffe in den Vertrag* (2013), 63–90, 81–6.

[84] Art 1112 *Code civil* states: 'L'initiative, le déroulement et la rupture des négociations précontractuelles sont libres. Ils doivent impérativement satisfaire aux exigences de la bonne foi. En cas de faute commise dans les négociations, la réparation du préjudice qui en résulte ne peut avoir pour objet de compenser la perte des avantages attendus du contrat non conclu.'

[85] A good overview on the to and fro is given by AH Kritzer, *Pre-Contract Formation* (2008) available online; see also DM Goderre, 'International Negotiations Gone Sour: Precontractual Liability under the United Nations Sales Convention', (1997) 66 *University of Chicago LR* 258–81. A nuanced view in H Fleischer, *Informationsasymmetrie im Vertragsrecht* (2001) 969–74.

[86] MJ Bonell, 'Vertragsverhandlungen und *culpa in contrahendo* nach Wiener Kaufrechtsübereinkommen', (1990) *Rechte der internationalen Wirtschaft*, 693–702, 700 f; Goderre (fn 85) 280.

[87] I Schwenzer, 'Aufwendungsersatz bei nicht durchgeführten Verträgen', in *Festschrift für Peter Schlechtriem* (2003) 657–76, 663 f.

[88] On this argument see *Schlechtriem and Schwenzer*/Schroeter, Intro to Art 14–15, [56]; Art 16, [13].

offereror into maintaining in force an offer that was revocable under the CISG.'[89] As a result, all pre-contractual liability is excluded. This creates a lacuna where the parties to a cross-border contract break off negotiations in bad faith, which is objectionable.[90] It seems that this unresolved problem of the CISG triggered the introduction of liability for breaking off negotiations in bad faith in the first edition of the PICC in 1994.[91] This international text can be seen as the starting point for the European contract law of *culpa in contrahendo*.

[89] *Schlechtriem and Schwenzer*/Schroeter, Art 16, [13].

[90] Goderre (fn 85) 280 f; opposite view in Magnus, 'Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts', (1998) 10 *Pace International LR* 89–95.

[91] They can be used to complete the CISG, see *Schlechtriem and Schwenzer*/Hachem, Art 19, [17] with further references. On the general problem of the treatment of PICC within the scope of the CISG: *Schlechtriem and Schwenzer*/Schmidt-Kessel, Art 9, [26]; R Michaels, 'Umdenken für die UNIDROIT-Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts', (2009) 73 *RabelsZ* 866–88.

Art 2:301: Negotiations Contrary to Good Faith

(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

PICC 2.1.15: Negotiations in bad faith[1]

(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

ACQP 2:101: Good faith

In pre-contractual dealings, parties must act in accordance with good faith.

ACQP 2:102: Legitimate expectations

In pre-contractual dealings, a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.

ACQP 2:103: Negotiations contrary to good faith

(1) A party is free to negotiate and is not liable for failing to reach an agreement.

(2) However, a party who has conducted or discontinued negotiations contrary to good faith is liable for loss caused to the other party.

(3) In particular, a party acts contrary to good faith if it enters into or continues negotiations with no real intention of reaching an agreement.

PCC 2:101: Duty to Negotiate in Good Faith and Fair Dealing

(1) Parties are free to initiate, continue and break off pre-contractual negotiations, provided they act in accordance with the requirements of good faith and fair dealing. The failure of pre-contractual negotiations can only give rise to liability if it is the consequence of a fault or actions contrary to good faith and fair dealing of either party.

(2) A party who enters into or pursues pre-contractual negotiations without the intention of concluding a contract does not respect the requirements to negotiate in accordance with good faith and fair dealing.

(3) A party who breaks off pre-contractual negotiations for no legitimate reason, while the other party could legitimately believe that a contract would be concluded, acts contrary to the requirements of good faith and fair dealing.

DCFR II.-3:301[2]

(1) A person is free to negotiate and is not liable for failure to reach an agreement.

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.

(3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

Synthesis (= PCC 2:101): Duty to Negotiate in Good Faith and Fair Dealing

(1) Parties are free to initiate, continue and break off pre-contractual negotiations, provided they act in accordance with the requirements of good faith and fair dealing. The failure of pre-contractual negotiations can only give rise to liability if it is the consequence of a fault or actions contrary to good faith and fair dealing of either party.
(2) A party who enters into or pursues pre-contractual negotiations without the intention of concluding a contract does not respect the requirements to negotiate in accordance with good faith and fair dealing.
(3) A party who breaks off pre-contractual negotiations for no legitimate reason, while the other party could legitimately believe that a contract would be concluded, acts contrary to the requirements of good faith and fair dealing.

[1] The text has stayed unchanged between the first and the second edition.
[2] Identical wording in FS 27.

I. Defining *culpa in contrahendo*

1 **Introduction.** The relevant textual layers are the PICC, the PECL, the ACQP, the DCFR, and the original text of the PCC. These texts prove that in European private law there is a common understanding of *culpa in contrahendo*, as meaning the breaking off of negotiations contrary to good faith and fair dealing. Such liability was first established in the PICC, which then influenced the PECL, the PCC, the ACQP, and the DCFR. All these texts start from the principle of freedom of contract and declare that the parties are free to break off negotiations. The ACQP vary from the other texts insofar as they particularly deal with consumer contracts, and take the view that in consumer contracts the principle of good faith must be realized by protecting the legitimate expectations of the consumers (ACQP 2:102). The CESL did not provide for a rule on the issue–apparently because it only applies where the negotiations between the parties have culminated in an agreement. Nevertheless, the instrument thereby evokes the misleading impression that the only duties that are relevant for the conclusion of the contract are the traders' duties of information. As for DCFR II.-3:301 and FS 27, the provision adds in paragraph 2 that the duty to negotiate in good faith and fair dealing is mandatory. But, as shown by PICC 1.7, this mandatory character is not a special feature of pre-contractual liability, but of the general duty to act in good faith.[3] Therefore, it seems to be more appropriate to leave this aspect out of the text on *culpa in contrahendo.*

2 **The PCC as most appropriate norm.** Most of the texts cited–apart from the PICC–state a duty to negotiate in good faith and according to fair dealing. They all agree that breaking off negotiations against these two principles leads to liability for the loss incurred by the other party. They also agree that particular examples of conduct against good faith are starting or continuing negotiations with no real intention to reach an agreement. While the liability in the PICC, PECL, and the texts following their example (the ACQP and the DCFR) only deals with this kind of fraudulent and intentional abuse of the right to interrupt negotiations, the PCC also explicitly mention the negligent breaking-off of negotiations. Starting from the assumption that breaking off negotiations can only give rise to liability if it is due to 'fault or actions contrary to good faith and fair dealing' (PCC 2:101 (1)),[4] the PCC state that 'a party who breaks off pre-contractual negotiations for no legitimate reason, while the other party could legitimately believe that a contract would be concluded, acts contrary to the requirements of good faith and fair dealing' (PCC 2:101 (3)). Therefore liability may also be incurred if the

[3] On the mandatory character of good faith see *Vogenauer*/Zuloaga Rios, Art 2.1.5, [46] f.

[4] On the PCC see B Fauvarque-Cosson and D Mazeaud, *Principes contractuels communs* (2008) 267 f; the wording of the PICC is rightly criticized by *Vogenauer*/Zuloaga Rios, Art 2.1.15, [25].

defendant, who negotiated in good faith and with the intention of reaching a contract, finally broke off negotiations for insufficient reasons and/or against the legitimate expectations of the other party. It is this behaviour that can be qualified as 'fault' in the sense of the provision meaning nothing else than an objective contravention against the rules of good faith and fair dealing (for further details see below, [18, 19, 20, 21]).[5] The commentaries on the other texts agree that these cases are covered by *culpa in contrahendo*, although they are not explicitly mentioned by the texts.[6] Since the PCC explicitly deal with this important application of the principle,[7] their English text will be the basis for the following commentary.

II. European authorities

The PICC as a first step. After the German Democratic Republic's unsuccessful attempt to integrate a duty to negotiate in good faith into the CISG, the PICC were the first text to state such a duty on the international level and for commercial contracts. This turning-point can be explained by a number of factors. First, it may have been of relevance that the PICC–in contrast to the CISG–are only model rules, not a binding convention; therefore the scepticism of most common law countries, which had argued against the principle within the *travaux préparatoires* on the CISG, did not prevail.[8] But it must be added that, since the CISG, good faith had become an established criterion in different common law countries.[9] On the one hand, an intention to prevent 'speculation with offers' had been recognized as against good faith by the Second American Restatement on Contract Law.[10] On the other hand, the implementation of the Unfair Terms in Consumer Contracts Directive had introduced the civil law criterion of good faith into the English legal system.[11] 3

The good faith criterion within the PICC. Nevertheless, it is evident that this first step towards a general duty to negotiate in good faith and according to fair dealing was taken with circumspection.[12] PICC 2.1.15, indeed, does not explicitly provide for a duty to negotiate in good faith, but lays down that 'a party who negotiates or breaks off negotiations in bad faith is liable 4

[5] Contrary to the German tradition, fault in French and in European private law does not imply a moral reproach; see W-T Schneider, *Abschied vom Verschuldensprinzip* (2007).

[6] For the PICC see Comment 3 to Art 2.1.14, p 16; see also *Vogenauer*/Zuluoaga Rios, Art 2.1.15, [31]–[37]; for the PECL see Commentary A.

[7] The French original of PCC 2:301 reads: 'Négociations contraires à la bonne foi. (1) Les parties sont libres de négocier et ne peuvent encourir de responsabilité pour ne pas être parvenues à un accord. (2) Toutefois, la partie qui conduit ou rompt des négociations contrairement aux exigences de la bonne foi est responsable du préjudice qu'elle cause à l'autre partie. (3) Il est contraire aux exigences de bonne foi, notamment, pour une partie d'entamer ou de poursuivre des négociations sans avoir de véritable intention de parvenir à un accord avec l'autre'. The English translation in Fauvarque-Cosson and Mazeaud, *European Contract Law*, 575.

[8] *Vogenauer*/Zuloaga Rios, Art 2.1.15, [20], who shows that–again, just as for the CISG–the German Democratic Republic was involved in the process.

[9] *Vogenauer*/Vogenauer, Art 1.7, [1] with further reference speaks of the 'global trend towards an increasing role for the standard of good faith in contract law'.

[10] On the American background see JM Perillo, 'Unidroit principles of International Commercial Contracts: The Black letter Text and a Review', (1994) 63 *Fordham LR* 281–344, 287 f. This can also be true under English common law; for a recent application on 'relational' contracts see *Yam Seng Pte v International Trade Corp* [2013] EWHC 111; *Bristol Groundschool Limited v Intelligent Data Capture Limited* [2014] EWHC 2145 (Ch); *1D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB). On Commercial Contracts see also S Leible, 'Culpa in contrahendo', in O Remien (ed), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht: Zwischenbilanz und Perspektiven–Würzburger Tagung vom 27. und 28.10.2006* (2008) 219–43, 231.

[11] For details on the directive in England see Beatson, Burrows, and Cartwright, *Anson*, 186–233.

[12] Van Erp, 'Culpa in contrahendo', 74.

for the losses caused to the other party'.[13] As the official comment on the PICC indicates, this negative formulation ('in bad faith') is to be interpreted as an application of PICC 1.7 on good faith and fair dealing. Therefore PICC 2.1.15 must be seen as equivalent to a positive formula ('against good faith and fair dealing') and all attempts to diminish the significance of the PICC for pre-contractual liability are wide off the mark.[14]

5 **Additions and variations in phrasing between PECL, PCC, and DCFR.** The PECL, like the Gandolfi Project,[15] published shortly after the PICC in 1995 and 1998 respectively, employed a positive formulation, and were the first to state that contracting parties are under a duty to act in accordance with the requirements of good faith and fair dealing.[16] The inversion from bad faith to good faith has been supported since the PECL by the addition of the synonym 'fair dealing'. The last term was added in order to stress that good faith is to be understood in the sense of a standard, not as a moral category,[17] and does not mean a change in the legal basis of the liability.[18] Indeed accumulations of synonyms for a general principle have a long historical tradition and can also be observed in national laws.[19] A final and important textual variation is due to the PCC in 2008. All other texts that follow the PICC 2.1.15 (3) state that it is 'contrary to good faith and fair dealing' viz 'bad faith', 'in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party' (PECL 2:301 (3), DCFR II.-3:301 (4)). However, the PCC add that 'a party who breaks off pre-contractual negotiations for no legitimate reason, while the other party could legitimately believe that a contract would be concluded, acts contrary to the requirements of good faith and fair dealing' (PCC 2:101 (3)). With this amendment the scope of the *culpa in contrahendo* in European law is clearly defined. It covers not only negotiations in bad faith, where the party pretends to be in a contracting state of mind, but also breaking off negotiations against good faith and fair dealing. Thus, it protects the other party's reliance if this is legitimate with regard to the principle of freedom of contract.

6 **Pre-contractual duties in consumer contracts and *culpa in contrahendo*: ACQP 2:101–ACQP 2:103.** European Union law has profoundly changed the pre-contractual phase by creating

[13] In PCC 2:101, the duty to negotiate in good faith has been completed by a reference to fair dealing and two examples of negotiations in bad faith have been added.

[14] S Vogenauer and J Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2009), [2] and [6] rightly criticized by *Vogenauer*/Zuloaga Rios, Art 2.1.15, [21]: 'Despite the adoption of this language [ie 'bad faith'], the drafters continued to recognize that this article made it clear that the principle of good faith extended to the pre-contractual phase.'

[15] Gandolfi, *Avant-projet*, Art 6. Obligation of good faith '1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith. 2. To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith. 3. If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith. 4. If the situations considered in the above paragraphs occur, the party who acted contrary to good faith shall be liable for the harm he has caused to the other party to the extent of the costs the latter had to incur while the contract was being negotiated. Loss of opportunities caused by the negotiations underway shall also be made good.'

[16] The PICC are to be understood in this sense, see *Vogenauer*/Zuloaga Rios, Art 2.1.15, [23].

[17] *Vogenauer*/Vogenauer, Art 1.7, [18] f.

[18] See E Navarretta, 'Faith and Reasonableness in European Contract Law', in J Rutgers and P Sirena (eds), *Rules and principles in European contract law* (2015) 135–50.

[19] The aspect has been stressed by *Vogenauer*/Vogenauer, Art 1.7, [19]. On the different layers of good faith see G Wicker, 'Guiding Principles of European Contract law', in Fauvarque-Cosson and Mazeaud, *European Contract Law*, 423–38, 515–31; B Fages, 'Pre-contractual Duties in the Draft Common Frame of Reference–What Relevance for the Negotiation of Commercial Contracts?', (2008) 3 *ERCL* 304–16, 313.

extensive duties of information and by establishing a right of withdrawal for the consumer.[20] Although it has been stated that the principles for consumer contracts are to be distinguished from general contract law,[21] the rules of liability for *culpa in contrahendo* might be altered if consumers are involved. Indeed if–as ACQP 2:102 states–'a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of the consumer', this can be interpreted in the sense that a professional has to respect a special standard of good faith when negotiating a contract with a consumer. This higher standard of protection could lead to a stricter liability for breaking off negotiations, at the cost of the professional, whenever the consumer had reasons to rely on the formation of the contract. One could, for example, argue that a professional facing a consumer may not withdraw from the negotiations because he discovers during negotiations that his supply is running out. On the contrary, due to the consumer's right to withdraw from the contract, there can be no protection of the professional's reliance during negotiations. Indeed, if the consumer is allowed to withdraw not only from an offer, but from a contract, there is no place for pre-contractual liability for breaking off negotiations from the side of the consumer.[22]

No need for *culpa in contrahendo* in consumer contracts. Both examples cited above ([6]) must be judged to be of merely theoretical interest, since consumer contracts normally do not involve the long period of negotiation and preparation of the contract which is said to be typical for commercial contracts and the reason for *culpa in contrahendo.*[23] Indeed, the overlaps between consumers and professionals that might have existed in some member states, eg France,[24] have been reduced by the Consumer Rights Directive in 2011.[25] Therefore, liability for *culpa in contrahendo* does not play a role in consumer contracts and its application can be limited to classical contract law, especially among autonomous commercial agents. 7

III. The legal basis of *culpa in contrahendo*

Policy arguments. Arguments and counter-arguments for pre-contractual liability have been exchanged between national and comparative law. The traditional argument against pre-contractual liability is its uncertain basis: since the outcome of negotiations cannot be known in advance, pre-contractual liability for breaking off negotiations seems to contradict the principle of freedom of contract (above, Intro before Art 2:301, [12]). On the other hand, supporters of the *culpa in contrahendo* normally invoke the need to protect the victim of blameworthy conduct, even at the stage of pre-contractual negotiations (above, Intro before Art 2:301, [4] and [8]). In recent years, economic analysis of law has strengthened the position of the supporters, 8

[20] R Schulze, 'Precontractual Duties and Conclusion of Contract in European Law', (2005) 6 *ERPL* 841–66, 847–55.

[21] Schulze (fn 20) 848.

[22] On the scope of the protection of a statute with regard to *culpa in contrahendo* see J Hager, 'Die *culpa in contrahendo* in den UNIDROIT-Prinzipien und den Prinzipien des Europäischen Vertragsrechts aus der Sicht des deutschen Bürgerlichen Rechts', in J Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000) 67–84, 72 f.

[23] PICC, Comment 2 to Art 2.1.1, p 35; PICC, Comment 3 to Art 2.1.15, p 61; on the negotiation process see also EA Farnsworth, 'Negotiations of Contracts and Precontractual Liability: General Report', in W Stoffel and P Volken (eds), *Conflits et Harmonisation Melanges en l'honneur d'Alfred E. von Overbeck* (1990) 657–80, 657 f.

[24] For an overview see Terré, Simler, and Lequette, *Obligations*, [74-1].

[25] See Art 2 of the Consumer Rights Directive. This demarcation between consumer and professional was developed in ECJ, 20.01.2005—C464/01, *Johann Gruber/Bay Wa AG.*

since *culpa in contrahendo* might be an efficient means of preventing opportunistic behaviour by parties who break off negotiations without a legitimate motive.[26] On this view, *culpa in contrahendo* favours freedom of contract insofar as opportunism may lead to 'under-investment' from the parties during pre-contractual negotiations, which may itself have the effect of less efficient contractual arrangements.[27] Having said that, any expansion of pre-contractual liability would lead to a corresponding loss of contractual freedom, since the parties would be prevented from breaking off negotiations that have exposed insuperable differences or that have proven to be inefficient.

9 **Systemic trust as argument for *culpa in contrahendo*.** A similar approach can be found in legal sociology, where Niklas Luhmann has developed the idea of systemic trust (*Systemvertrauen*).[28] Transferred to *culpa in contrahendo*, this means that pre-contractual liability is not only relevant for the protection of individual parties, but also contributes to general trust in the functioning of the legal system, especially contract law.[29] In legal terms, the need to balance freedom of contract and loyalty is best expressed in French law:[30] while freedom of contract is seen as the very basis of pre-contractual negotiations, the principle of loyalty is said to be 'a safeguard' (*garde-fou*) against the risk of unconscionable behaviour or rupture of negotiations.[31] Equally, in European private law, the limitation of freedom of contract via pre-contractual liability is justified by the general principle of good faith and fair dealing,[32] that is to say, by the protection of the other party's faith in and reliance on the conclusion of the contract.

IV. The behaviour giving rise to liability

1. The principle: breaking off negotiations contrary to good faith and fair dealing

10 **The negotiation process.** Since the scope of *culpa in contrahendo* in European private law covers liability for breaking off negotiations contrary to good faith and fair dealing, it is necessary to define the scope covered by the term 'negotiations'. The term 'negotiations' focuses on the gradual process of contract formation. It does not exclude an analysis of the final contract in offer and acceptance terms, but puts the emphasis on the parties' preparations for the future contract. Via 'negotiations,' it is possible to consider the parties' behaviour even before any issue of an offer, or a formalization of the results reached so far in a preliminary

[26] EC Melato, 'Precontractual liability', in G de Geest, *Contract Law and Economics* (2nd edn, 2011) 9–30, 23, referring to JP Kostritsky, 'Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations', (1993) 44 *Hastings LR* 621–705; JP Kostritsky, 'Uncertainty, Reliance, Precontractual Negotiations and the Hold-up Problem', (2008) 61 *SMU LR* 1377–439.

[27] See H Fleischer, *Informationsasymmetrie im Vertragsrecht* (2001) 419 with further reference; RG Shell, 'Opportunism and Trust in the Negotiation of Commercial Contracts: Towards a New Cause of Action', (1991) 44 *Vanderbilt LR* 221–82.

[28] N Luhmann, *Vertrauen–ein Mechanismus der Reduktion sozialer Komplexität* (3rd edn, 1989) 50–7; in English see N Luhmann, 'Familiarity, confidence, trust: Problems and alternatives', in D Gambetta (ed), *Trust: Making and breaking cooperative relations* (1988) 94–107. For an application to Roman law see D Nörr, *Aspekte des römischen Völkerrechts: Die Bronzetafel von Alcantara* (1989) 145–54.

[29] Fleischer (fn 27), 422 f.

[30] J Ghestin, G Loiseau, and Y-M Serinet, *Traité de droit civil: La formation du contrat*, vol I (4th edn, 2013) 513–15, [709–11].

[31] See Ghestin, Loiseau, and Serinet (fn 30) 514, [711].

[32] This generative function of good faith for different legal doctrines has been stressed also by Zimmermann and Whittaker, *Good faith*, 676 (citing also *culpa in contrahendo*); see also Van Erp, 'Pre-contractual Stage', 502.

agreement (below, [12]). Although all European textual layers and national legal systems in Europe still use the offer and acceptance model of contract formation,[33] it is widely accepted that there might be contracts[34] that cannot be analysed via this model. Moreover, the offer and acceptance model does not exclude a phase of negotiations. In fact, there might be cases in which, after a period of negotiations, one party makes a proposal with the characteristics of an offer (above, Intro before Art 2:301, [6]), which is then accepted by the other party. While an 'offer' has a specific juridical content, 'negotiations' are more a matter of fact. As a guideline, it can be said that the period of negotiations has begun when the parties are in contact and start to exchange relevant information with the potential for making a later contract. The end of negotiations is either the conclusion of a contract; a withdrawal from negotiations by all the parties; or a unilateral break-off by one party.[35] Liability for *culpa in contrahendo* may apply to this last alternative. If the party who is breaking off did not follow the standard of good faith and fair dealing, he will be liable for infringement of the mutual trust that is at stake in negotiations for a contract.[36]

Preliminary agreements: contractual liability. A special situation for *culpa in contrahendo* arises if the parties have reached preliminary agreements before one party breaks off the negotiations.[37] 'Preliminary agreement' refers to any agreement 'made during negotiations in anticipation of some later agreement that will be the culmination of the negotiations'.[38] In practice, these agreements might have different names[39] and different scopes depending on the parties' requirements. For example, the parties may intend to fix some issues on which an agreement has already been reached;[40] to keep third parties out of the negotiation process;[41] or to assure the continuation of the negotiations. In the common law, there has been a debate about the enforceability of 'agreements to negotiate'[42] or 'to negotiate in good faith'[43] or 'to use best endeavors' to form a contract.[44] Since European private law acknowledges the duty to negotiate in accordance with good faith and fair dealing even without any prior agreement of the parties, the disputed agreements must in principle be enforceable. If the parties' intention to be bound 11

[33] See Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law* [6.1]–[6.4]; Farnsworth (fn 23) 659 f.

[34] See PECL 2:211 (Contracts not Concluded through Offer and Acceptance), which only provide that the rules (applicable to contracts concluded via offer and acceptance) 'apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance'; DCFR II.-4:211.

[35] On these guidelines see *Vogenauer*/Zuluoga Rios, Art 2.1.15, [17].

[36] De Coninck, 'Le droit commun', 55 f and 60.

[37] A general analysis in Farnsworth, 'Precontractual Liability', 217–94; see also A Schwartz and RE Scott, 'Precontractual Liability and Preliminary Agreements', (2007) 120 *Harvard LR* 662–707.

[38] Farnsworth, 'Precontractual Liability', 249 f.

[39] Farnsworth, 'Precontractual Liability', 250 names 'letter of intent', 'commitment letter', 'agreement in principle', 'memorandum of understanding', or 'heads of agreement'; J Schmidt-Szalewski, 'La période précontractuelle en droit français', (1990) 42 *Revue Internationale de Droit Comparé* 545–66, 560 cites 'le pacte de preference', 'les contrats partiels' (punctuation), and 'les contrats temporaires'.

[40] Farnsworth, 'Precontractual Liability', 250 speaks of an agreement with open terms.

[41] On lock-out agreements (for England) see J Cartwright, 'Case 4', in Cartwright and Hesselink, *Precontractual Liability*, 119 f.

[42] For English law see *Walford v Miles* [1992] 2 AC 128. On which see Banakas, 'Liability', 8–13; Van Erp, 'Precontractual Stage', 504 f; for American law see Farnsworth, 'Precontractual Liability', 251 and 264 with reference to *Ridgway v Wharton* (1857) 6 HLC 238, 304 f (10 ER 1287, 1313) (Lord Wensleydale).

[43] Farnsworth, 'Precontractual Liability', 256.

[44] *Little v Courage* [1995] 70 P & CR 469, 475 ([1995] CLC 164); on which see Banakas, 'Liability', 11 f. *London and Regional Investments Ltd v TBI plc, Belfast International Airport Ltd* [2002] EWCA Civ 355, [38–40]; *Cable & Wireless v IBM UK* [2002] EWHC 2059 (Comm); *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891; *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417.

can be proven, the nature of the liability incurred is–irrespective of the quality of the liability incurred for *culpa in contrahendo*–of a contractual nature.[45]

12 **Preliminary agreements: limitations to reliance interest.** However, if the preliminary agreement stipulated a duty to negotiate in good faith or according to fair dealing, it may be appropriate to limit the scope of liability to the reliance interest,[46] insofar as the parties' agreement only reiterates an existing legal duty. In this respect, the European provisions on *culpa in contrahendo* can be seen as a guideline for the interpretation of preliminary agreements. Moreover, if the parties declared that their pre-contractual arrangements were not binding, eg by referring to them as 'gentlemen's agreements',[47] the general provision of *culpa in contrahendo* can still be applied, if the requirements of good faith and fair dealing have been infringed by one negotiating party. In this case, the liability will directly stem from European law and not from the parties' contract.

13 **The good faith criterion.** It has been pointed out that good faith in the European law texts has the quality of a 'meta-language' (*méta-language*), which allows communication between different legal systems[48] on the prevention of abuses of freedom of contract. In fact, it has been stressed that on a functional level, most cases of *culpa in contrahendo* can also be sanctioned under the common law.[49] The criterion of good faith has its origin in the civil law, since it derives historically from the Roman notion of *bona fides*.[50] As already mentioned, despite the traditional scepticism of the common law[51] the standard of good faith and fair dealing has become a global and especially a European trend, even in common law jurisdictions (above, [3]).[52] All textual layers of European private law (since the PECL) unanimously acknowledge a general duty of parties to act in accordance with good faith and fair dealing.[53] The PCC have made some minor amendments to the text of PECL[54] which already stress the importance of this standard at the stage of the pre-contractual negotiations.[55]

[45] For France (which treats *culpa in contrahendo* as an example of tortious liability) see Schmidt-Szalewski (fn 39) 555–66; J Ghestin, 'La responsabilité contractuelle pour rupture des pourparlers', in J-S Borghetti, O Deshayes, and C Pérès (eds), *Etudes offertes à Geneviève Viney* (2008) 455–65.

[46] Farnsworth, 'Precontractual Liability', 264.

[47] Farnsworth, 'Precontractual Liability', 257.

[48] See H Muir-Watt, 'Les pourparlers: de la confiance trompée à la relation de confiance', in P Rémy-Corlay and D Fenouillet, *Les concepts contractuels français à l'heure des Principes du droit européen des contrats*, (2003) 53–64, 54 f: 'On peut dire que le concept de bonne foi constitue à cet égard un ‚méta-langage' (selon le terme de Nicholas Kasirer) qui permet une communication relativement ajustée des différents systèmes, au-delà de leurs divergences techniques.' In the same vein *Vogenauer*/Vogenauer, Art 1.7, [4]; MJ Storme, 'Good faith and contents of contracts in European private law', in S Espiau Espiau and A Vaquer Aloy (eds), *Bases de un derecho contractual europeo: Bases of European Contract law* (2003) 30: 'vague norms to organise sustainable diversity'.

[49] See Zimmermann and Whittaker, *Good faith*, 690–7; see also Farnsworth (fn 23) 660–8.; *Vogenauer*/Vogenauer, Art 1.7, [7], who stresses the subsisting differences on the conceptual and structural level.

[50] MJ Schermaier, 'Bona fides in Roman contract law', in Zimmermann and Whittaker, *Good faith*, 63–92, especially 67 f.

[51] The good faith criterion is not completely foreign to English law. On contracts of *uberrima fides* see Peel, *Treitel*, [3-161]; N Schneider, *Uberrima fides: Treu und Glauben und vorvertragliche Aufklärungspflichten im englischen Recht* (2004) 111–237; L Loacker, *Informed Insurance Choice? The Insurer's Pre-contractual Information Duties in General Consumer Insurance* (2015) 149–80.

[52] *Vogenauer*/Vogenauer, Art 1.7, [1].

[53] This trend in European private law has had its repercussion for national law. See eg Art 1104 *Code civil*: 'Les contrats doivent être négociés, formés et exécutés de bonne foi' and Art 1112 *Code civil*.

[54] See PECL 1:201.

[55] See PCC 0:301: General duty of good faith and fair dealing. 'Each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect. The parties may neither exclude this duty, nor limit it.' The addition of PCC 0:302: Performance in good faith, seems to be redundant.

Good faith in comparison to other criteria. Due to the evolutionary power of good faith, the precise content of the criterion must be defined according to the circumstances of every single case. With regard to pre-contractual liability, there are some general considerations to be taken into account in order to elucidate the concept. The first argument is systematic. Since PCC 2:101 and all the other textual layers stress the principle of contractual freedom, good faith is to be interpreted as a corrective principle[56] which indicates that freedom of contract is not unlimited. This function corresponds to the general understanding of good faith as 'the need to take into account the legitimate interests of the other party'.[57] This respect for the other party not only has a moral quality, but provides an objective standard of conduct. On this view, the good faith criterion is close to the reasonableness enshrined in PECL 1:302.[58] It applies the standard of a third person 'in the shoes of the parties' in order to judge whether the conduct is reasonable or not. An even stricter standard is the criterion of inconsistent behaviour in PICC 1.8.[59] This can be identified with a prohibition of self-contradictory conduct (*venire contra factum proprium*).[60] If a party has led the other to believe something, this mistaken belief will be protected, and the inconsistent behaviour may not result in a benefit for the inconsistent party. The standard of good faith covers both situations and goes even beyond. 14

A functional approach to good faith. The broadness of the notion of good faith as criterion for pre-contractual liability may also be seen as problematic, since it may invite the courts to refer to national preconceptions when applying the European texts. The risk of replacing the necessary European standard with a national reference,[61] can, however, be minimized by a functional approach to good faith, at least with regard to pre-contractual negotiations. If good faith imports standards for reasonable and consistent conduct, and, at the same time, protects mistaken beliefs, it is possible to shape the general expectations of the parties at the pre-contractual stage. On the one hand, negotiating parties are presumed to be honest when they negotiate, and to disclose any relevant information to the other party. This is why, in all European texts on *culpa in contrahendo*, non-disclosure of an intent not to conclude the contract is a special type of liability (PCC 2:101 (2)). On the other hand, the parties are asked to consider and to respect the other party's legitimate interests and to behave consistently. This is why all European texts sanction the breaking off of negotiations in bad faith as the second expressly stated category of *culpa in contrahendo* (PCC 2:101 (3)). 15

2. Particular applications of the principle

Absence of the intention to conclude a contract (PCC 2:101 (2)). The first category of liability is the original or subsequent absence of the intention to conclude a contract, where the party is negotiating and does not disclose his inner reservation. The PICC 2.1.15 (2) as well as the PECL 2:301 (2) and the PCC 2:101 (2) stress that 'a party who enters or pursues pre-contractual negotiations without the intention of concluding a contract does not respect the requirements to negotiate in accordance with good faith and fair dealing.' In fact, by negotiating without the intention to be bound by a contract, the party deceives the other and abuses his contractual 16

[56] On synonyms for principle see A Tenenbaum, 'Terminology', in Fauvarque-Cosson and Mazeaud, *European Contract Law*, 190–4, 157.
[57] Storme (fn 48) 19.
[58] PECL 1:302, Comment B.
[59] See the general survey by *Vogenauer*/Vogenauer, Art 1.7, [10].
[60] Storme (fn 48) 28 f.
[61] Similarly on the international standard in the PICC see *Vogenauer*/Vogenauer, Art 1.7, [16].

freedom.[62] This extreme example of 'sham negotiations'[63] is acknowledged as a ground for liability both in civil law and in common law jurisdictions.[64] Typical applications of this principle are situations where a party engages in negotiations for the sole purpose of achieving another objective, 'such as preventing the other party from contracting with a competitor of the first party, or with the sole purpose of raising the price in a parallel negotiation with a third party, or for the sole purpose of obtaining knowledge of business secrets of the other party.'[65]

17 **Matters of proof.** While the ground of the aforementioned liability for 'sham negotiations' (above, [16]) is undisputed, some scholars have raised the difficulties of proving the party's lack of intention to conclude a contract during the negotiation process.[66] Even if it is true that distinguishing between a pure coincidence and blameworthy conduct might be complex, the proof of inner facts or hidden motives is also common in other respects, eg PECL 4:103, mistake as to facts or law. A standard of proof for the lack of intention can be derived from PECL 2:102. This provision states that 'the intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.' As a first step, then, the court will have to determine whether the party's conduct had to be interpreted as showing an intention to be legally bound by a future contract. As a second step, the court will have to consider whether conduct vis-à-vis third persons and declarations not known to the other party must be interpreted as showing that the party was only pretending to be interested in binding himself by a contract. The distinction between these two stages also allows the court to deal with a 'change of intention', which–as national experience, especially in common law countries, suggests–might be even more difficult to prove.[67]

18 **Absence of a legitimate reason (PCC 2:101 (3)).** Most commonly, the question of whether pre-contractual liability arises when a party who has so far negotiated with the intention to conclude a contract breaks off pre-contractual negotiations. This situation is also the most delicate, since the equilibrium between the party's negative freedom of contract and the protection of the other party's good faith (above, [13]–[15]) is difficult to establish. As already mentioned (above, [2]), the answer of the PCC 2:101 (3) to this dilemma lies in a further qualification of the parties' conduct.[68] The aggrieved party can only ask compensation for the losses encountered if the party 'could legitimately believe, that a contract would be concluded'; furthermore, the defendant will only be held liable if there was no 'legitimate reason to break off the pre-contractual negotiations'. Both conditions must be fulfilled simultaneously.[69] In contrast to some national laws, European *culpa in contrahendo* does not apply if the defendant has already made an offer to the claimant and if, exceptionally, this offer cannot be revoked.[70] For this case,

[62] See also (for Denmark) O Lando, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 23 f: 'cheat contracting'.

[63] See *Vogenauer*/Zuloaga Rios, Art 2.1.15, [26].

[64] For England see J Cartwright, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 25: 'It is essential for B's case that he prove that A made a false statement during the precontractual negotiations about his intentions to conclude the contract'; on the difficulties of this condition see Peel, *Treitel*, [9-010].

[65] *Vogenauer*/Zuloaga Rios, Art 2.1.15, [26]. See the cases given as illustrations, see PECL 2:301 (4), Commentary C, Illustration 1 and PECL 2:301 (4), Commentary D, Illustration 2.

[66] Fages (fn 19) 314; Hager (fn 22) 72 f; Muir-Watt (fn 48) 58.

[67] *Traill v Baring* [1864] 4 De G J & S, 318 (46 ER 941); *Wales v Wadham* [1977] 1 WLR 199, on both see Peel, *Treitel*, [9-133].

[68] PCC 2:101 (1) para. 2 underlines that the 'failure of pre-contractual negotiations can only give rise to liability if it is the consequence of a fault or actions contrary to good faith and fair dealing of either party.'

[69] For an overview EH Hondius, 'General report', in Hondius, *Precontractual Liability*, 1–28, 19 f; on these cases in German law, see W Küpper, *Das Scheitern von Vertragsverhandlungen als Fallgruppe der culpa in contrahendo* (1988) 48–59.

[70] This solution is explicitly maintained in French law, see Art 1116 (2) and (3) *Code civil*.

PECL 2:202 contains a special provision that leads to the conclusion of the contract: even if the offer itself did not indicate that it was irrevocable, the contract will be concluded if 'it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer' (PECL 2:202 (3)(c)).

The legitimate belief (reliance) of the claimant. In order to determine if the belief of the claimant was legitimate, it might be useful to go back to national case law, where the problem has been amply discussed.[71] One criterion that can sometimes be found in national law is the duration of the negotiations.[72] In European law, due to the standard of good faith in the field of pre-contractual liability, this criterion can only be applied in the sense that objectively, from the viewpoint of a reasonable third party, the 'point of no return'[73] in the negotiation process has been reached. Any subjective 'belief' of the claimant that cannot be founded on actual evidence is irrelevant, and expenses that the claimant incurred without any foundation are not to be compensated.[74] The reliance of the aggrieved party must be objectively comprehensible from the facts of the case.[75] Facts that might help to justify the reliance are, primarily, the other party's (the defendant's) conduct or statements. For this, an analogy with PECL 6:101 (1) may be helpful.[76] 19

The defendant's legitimate reason for breaking off negotiations. If the claimant had a legitimate reason to rely on the conclusion of the contract, it is up to the defendant to prove that he did not break off without legitimate reason, but that this was justified by special circumstances. Since the principle of breaking off without a legitimate motive in PCC 2:101 (3) directly derives from French law, the French doctrine and jurisprudence can be used to elucidate European *culpa in contrahendo* in this respect. It can be observed that the parties' actions are connected: therefore, legitimate reliance on the claimant's side and legitimate motive for breaking off on the defendant's side cannot be clearly separated. Once it has been shown that the claimant had a legitimate reason to rely on the formation of the contract, the defendant will need exceptional circumstances to prove that breaking off negotiations was nevertheless legitimate. 20

Weighing parties' motives and interests. The weighing of the parties' motives and interests corresponds to the French understanding of *culpa in contrahendo* as an application of the theory of abuse of rights.[77] As has been shown, this understanding of pre-contractual liability is also compatible and consistent with European law (above, [9]). According to the French *Cour de cassation*, freedom of contract is abused if the party who has made the other believe in the formation of the contract breaks off without any legitimate motive (*motif légitime*)[78] or with 21

[71] Muir-Watt (fn 48) 58; Peel, *Treitel*, [9-133].

[72] *Plas v Valburg*, HR, (1983) *NJ* 723 (18.06.1982); Cass com, 95–20361 (07.04.1998), on which see Ghestin, Loiseau, and Serinet (fn 30) 543, [752].

[73] Muir-Watt (fn 48) 55; this is also the criterion developed for the PICC, see *Vogenauer*/Zuloaga Rios, Art 2.1.15, [32].

[74] See W Posch, 'Austria', in Hondius, *Precontractual Liability*, 43–52, 48 f.

[75] Examples from different civil law countries; eg for Austria W Posch, 'Case 4', in Cartwright and Hesselink, *Precontractual Liability*, 117 f; for Sweden C Ramberg and J Herre, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 54–6; for Swizerland P Loser, 'Case 1', in Cartwright and Hesselink, *Precontractual Liability*, 56–60.

[76] The official comment does not deal with this possibility. But if broken promises–as Comment C shows–can lead to remedies for non-performance, one can argue that 'broken promises' during the pre-contractual negotiations can–if the other conditions of *culpa in contrahendo* are fulfilled–lead to pre-contractual liability.

[77] On the relationship between good faith and the notion of abuse see Tenenbaum (fn 56) 190–4.

[78] Three decisions from the 1970s are said to be fundamental for the modern development of *culpa in contrahendo* in French law: Cass com, 70–14154, Bull civ IV 1972, No 93 (20.03.1972) (for an English translation of the decision see Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.15 (FR)]); Cass civ, 71–12993, Bull civ III 1972, No 491 (03.10.1972) (for an English version see id, *Contract Law*, [9.16 (FR)]); Cass civ, 74–11770, Bull civ I 1976, No 122 (12.04.1976). For a brief overview see de Coninck, 'Le droit commun', 22 f.

'blameworthy thoughtlessness' (*légèreté blâmable*).[79] These criteria will have normally been fulfilled if the other party's reliance was legitimate and no new element can be found in favour of the defendant. The (persuasive) value of an absence of legitimate reason on the defendant's side is more important in the more special cases where the claimant believed he was 'the one and only' candidate for the contract. Although this belief is generally not protected, the French courts have held that the claimant's belief was legitimate in cases where the defendant was especially reckless, namely: 1) where the other party broke off crudely, that is to say without any prior information or just before the final signature of the fixed terms of the agreement;[80] or 2) where the other party broke off regardless of the consequences for the other party and despite declarations to the contrary.[81] Since both situations are evident contraventions of good faith and fair dealing, it seems to be appropriate to use similar criteria in the European law of *culpa in contrahendo.*

3. The legal consequences: reliance interest

22 **The unsolved question of the nature of the liability in European law.** The European concept of *culpa in contrahendo*, based on good faith and fair dealing, endeavours to harmonize the more complex national realities (above, [5]). Besides the divide between the common law and civil law, the civil law countries that accept pre-contractual liability have diverging ideas about its nature. The German-speaking tradition tends to apply contractual liability,[82] while the Romance countries classify the same liability as tortious.[83] The European restatements cite different legal traditions, leaving the question open.[84] The simple reference to good faith does not allow a decision in one or other direction. Nor can the fact that the 'PECL' are principles of contract law be interpreted in favour of contractual liability. Since the nature of the liability was so diverse in European countries when the restatements of the PECL, the DCFR, and the PCC were drafted, it seems to be most appropriate to avoid the afore-mentioned dualism and to define European pre-contractual liability as a 'third way', ie a liability that is neither purely contractual nor purely tortious.[85]

23 **Pre-contractual liability as 'third way' in between tortious and contractual liability.** The understanding of *culpa in contrahendo* in European private law as a 'third way' besides tortious and contractual liability would avoid the vexed question of what legal rules to apply to pre-contractual liability. The question is vexed, since the principle on *culpa in contrahendo* is contained in restatements on contract law but does not follow the rules of contractual liability.[86]

[79] Cass com, 91–18842, Bull civ IV 1994, No 79 (22.02.1994).

[80] All case law in M Poumardère, 'Responsabilité contractuelle et inexécution contractuelle', in P Le Tourneau (ed), *Droit de la Responsabilité et des Contrats: régimes d'indemnisation* (9th edn, 2012) 397, [841].

[81] Poumardère, (fn 80) 397, [841]. Important in this regard is the Manoukian-case, Cass com, 00–10243; 00–10949, Bull civ IV 2003, No 186 (26.11.2003), for an English translation see Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.9 (FR)].

[82] For a brief overview see W Posch, 'Does it Matter Whether *Culpa in Contrahendo* is located in Tort/Delict or Contract?', in K Boele-Woelki and W Grosheide (eds), *The Future of European Contract Law, Essays in honour of E Hondius* (2007) 307–20.

[83] CA Paris, Gaz Pal 1883, II, 414 (13.02.1883); see J Schmidt, 'La sanction de la faute précontractuelle', (1974) 72 *Revue trimestrielle de droit civil* 46–73, 51. On the recent discussion on this basis see Ghestin, Loiseau, and Serinet (fn 30) 530–4, [731]–[738].

[84] PECL 2:301 (1), Notes 1.

[85] See Posch (fn 82) 307–20.

[86] This problem is well known from the PICC, see *Vogenauer*/Zuloaga Rios, Art 2.1.15, [7], who states that 'Art 2.1.15 sits uneasily within the PICC'.

Arguing for a 'third way' would also take into account recent developments within the national laws of some member states that tend nowadays to enact statutory provisions for *culpa in contrahendo* (above, Intro before Art 2:301, [13]). With a view to these special provisions it can be assumed that the question of its contractual or tortious nature has become less relevant.[87] In fact, the new statutory basis implies that the rules of contractual or tortious liability traditionally applied to *culpa in contrahendo* (above, Intro before Art 2:301, [10] and [11]) are now only needed for accessory questions, such as prescription and liability of third parties. Also for the European private law, there is no need to define the nature of the pre-contractual liability, since the rules applicable are clear irrespective of their contractual or tortious character.[88] It does not cause any problem to apply, eg the general three-year prescription period of PECL 14:201 to *culpa in contrahendo*, since PECL 14:203 (1) provides that the 'general period of prescription ... begins, in the case of a right to damages, from the time of the act which gives rise to the claim'. In the case of pre-contractual liability, the period will start to run from the time the defendant broke off negotiations in bad faith.[89] If third parties are involved in the negotiating process, the principle of PECL 1:305 (b) applies.[90] It states that 'if any person who with a party's assent was involved in making a contract ... (b) acted intentionally or with gross negligence or not in accordance with good faith and fair dealing, this knowledge, foresight or behavior is imputed to the party itself'.

Loss covered. PECL 2:301 (3) speaks of the 'loss that the party by breaking off from negotiations has caused to the other party'. PCC 2:101 does not contain any further specification, but accepts the solution presented by the PECL, ie the compensation of the reliance interest (above, Intro before Art 2:301, [7]). The Commentary to the PECL explains that the losses covered 'include expenses incurred, work done and loss on transactions made in reliance of the expected contract.'[91] This explanation picks up the elements that are widely accepted in the civil law under the heading of the negative interest[92] and in the common law under the heading of the reliance interest.[93] The first restatement to grant this interest for *culpa in contrahendo* in transnational law was the PICC. The negative interest also covers the loss of profits, meaning the benefit of another contract that the claimant could have demonstrably concluded with a third person if he had not relied on the negotiations already begun.[94] Exceptionally, the positive interest will also be compensated, if the parties are bound by preliminary agreements that provide a duty to negotiate in good faith and fair dealing. The liability incurred for infringement of this agreement will be of a contractual nature (above, [11]), and may therefore also entail the positive or the expectation interest.[95] 24

Expectation interest not covered. Liability for *culpa in contrahendo* is restricted to the reliance interest and does not cover the interest the party had in the performance of the contract, ie the 25

[87] In this respect Posch (fn 82) 311 evokes the qualification as 'legal relation' (Hondius) or the 'relational theory of the law of contract' (Macneil).

[88] PECL 14:201; the general period of prescription is three years.

[89] This is also the view of PECL 14:203, Comment B.

[90] PECL 1:305, Comment D explicitly cites the provision on *culpa in contrahendo* PECL 2:301 (2).

[91] PECL 2:301, Comment G.

[92] R Jhering, 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen', (1861) 4 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1–112, 20; Hondius, *Precontractual Liability*, 22 f.

[93] On detrimental reliance in contract and in tort see Giliker, *Pre-contractual Liability*, 105–33.

[94] De Coninck, 'Le droit commun', 35 f; for Swiss law see BGE 77 II 135, 137 (06.06.1951); 80 II 26, 37 f (02.02.1954).

[95] In the same vein for the PICC see *Vogenauer*/Zuloaga Rios, Art 2.1.15, [43].

positive or expectation interest (above, Intro before Art 2:301, [7]). This scope of pre-contractual liability is widely accepted in comparative law, and recalled in the commentary on PECL 2:103.[96] In national law, some hesitation over the principle can nevertheless be observed. The French *Cour de cassation* has only recently abandoned the longstanding practice of compensating the aggrieved party in *culpa in contrahendo* for loss of an opportunity (*perte d'une chance*).[97] Sometimes, German courts have granted the positive interest,[98] where one party refuses to sign the draft contract, and where the parties have fully agreed on the contract, only needing to fulfil the legal formalities.[99] Also, the Dutch case *Plas v Valburg* (above, Intro before Art 2:301, [8]) is often interpreted as meaning that the Hoge Raad permitted the compensation of the positive interest under certain circumstances.[100] However, all these cases deal with situations where a contract would have been concluded if the retreating party had not violated his pre-contractual duties.[101] Therefore no general principle can be derived from this (national) case law.

26 **No exceptions in European private law.** For European private law, it must be borne in mind that the compensation of the positive interest via *culpa in contrahendo* would amount to a *de facto* enforcement of a contract the parties did not conclude, and would therefore violate the other party's negative contractual freedom. It seems at first sight that some minor loosening of the principle may be possible under the PICC, since the official commentary states that 'the aggrieved party may *generally* not recover the profit which would have resulted had the original contract been concluded (so-called expectation or positive interest)'.[102] With this, the Commentary on the PICC refers to the exceptional case of preliminary agreements that lead to contractual liability and a claim of the positive interest (above, [10]). However, some scholars have interpreted the word 'generally' in the sense that some of the exceptional admissions of the positive interest were to be integrated into European private law.[103] It must also be admitted that the Commentary on the PECL gives reasons for doubt, since it states that 'in some cases loss of opportunities may also be compensated'.[104] Since the Commentary to the PECL stresses, at the same time, that no positive interest is to be granted, this addition can only be interpreted

[96] PECL 2:301, Comment G: 'However, the aggrieved party cannot claim to be put into the position in which it would have been if the contract had been duly performed'.

[97] Cass com, 00–10243; 00–10949, Bull civ IV 2003, No 186 (26.11.2003) (*Manoukian*): 'Mais attendu que les circonstances constitutives d'une faute commise dans l'exercice du droit de rupture unilatérale des pourparlers précontractuels ne sont pas la cause du préjudice consistant dans la perte d'une chance de réaliser les gains que permettait d'espérer la conclusion du contrat'; confirmed by Cass civ, 04–20040, Bull civ III 2006, No 164 (28.06.2006). On this argument see O Deshayes, 'Le dommage précontractuel', (2004) *Revue trimestrielle de droit commercial et économique*, 187–204, 192 f; see also Art 1111 (3) *Code civil*: 'Les dommages et intérêts ne peuvent avoir pour objet de compenser la perte des bénéfices attendus du contrat non conclu.'

[98] See BGHZ 48, 396 (27.10.1967); BGH, (1997) *JZ* 467 (29.03.1996).

[99] On these cases see Küpper (fn 69) 268; critically W Lorenz, 'Germany', in Hondius, *Precontractual Liability*, 159–77, 167. For an example under the common law see (for England) J Cartwright, 'Case 6', in Cartwright and Hesselink (eds), *Pre-contractual liability*, 280. Another example would be the abuse of economic power ('Kontrahierungszwang' or coerced contracts) see BGH, (1993) *NJW* 520 (*Oolitic Stones*, 25.11.1991), in Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.22 (DE)].

[100] Hondius, *Precontractual Liability*, 17 interpreting *lucrum cessans* as expectation interest. Good arguments against this interpretation are found in JM van Dunné, 'Netherlands', in Hondius, *Precontractual Liability*, 223–37, 230 f; C Bollen, 'Enforcement of the duty to carry on negotiations: (Should it be) a possibility in Europe or not?', in J Smits, D Haas, and G Hesen (eds), *Specific Performance in Contract Law: National and Other Perspectives* (2008) 231–51, 233 f.

[101] Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.22 (DE)] Commentary.

[102] Commentary 2 to Art 2.1.15, p 60.

[103] On this difference see Bollen (fn 100) 238.

[104] PECL 2:301, Comment G.

with reference to a problem known from the Italian case, 'The Giuliana', in 1993.[105] In this case, the aggrieved party had wanted to conclude a contract with a third party, but of a different type to the one for which the negotiations were broken off in bad faith. The *Corte di cassazione* held that this loss was also to be compensated, although the nature of the lost opportunity was not identical to the contract that the parties were negotiating. This principle also seems to apply to European private law, since it would be inconsistent to restrict the party's reliance with regard to the nature of the lost contract.

No place for specific performance. Exceptionally, the question has been raised if there can be a claim to continue negotiations, ie a claim of specific performance.[106] While some national law, eg Dutch law, holds that it is in principle possible to oblige parties to continue negotiations, the prevailing view in national law is that pre-contractual liability for breaking off negotiations is limited to the compensation of damage.[107] This view must *a fortiori* also be valid for European private law, since the wording of 'losses' and 'liability' clearly shows that the drafter of any text did not think of specific performance, but of pecuniary compensation. 27

[105] Cassazione civ, 2973, *Foro it* I 1994, 956 (12.03.1993); see also Beale, Fauvarque-Cosson, Rutgers, Tallon and Vogenauer, *Contract Law*, [9.20 (IT)]. See also A Gambaro and U Morelli, *Lezioni di diritto civile* (2012) 11 f.

[106] Hondius, *Precontractual Liability*, 23; Van Dunné (fn 100) 231 f; Bollen (fn 100) 239–48.

[107] For a detailed discussion see Küpper (fn 69) 262–73; for a restriction on pecuniary compensation D Kaiser, 'Schadensersatz aus *culpa in contrahendo* bei Abbruch von Verhandlungen über formbedingte Verträge', (1997) *JZ* 448–53, 453. For French law see Bollen (fn 100) 244.

Art 2:302: Breach of Confidentiality

If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for loss suffered and restitution of the benefit received by the other party.

PICC 2.1.16: Duty of confidentiality

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

PCC 2:103: Duty of Confidentiality

If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for losses suffered and restitution of the benefit received by the other party.

DCFR II.-3:302: Breach of confidentiality

(1) If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for that party's own purposes whether or not a contract is subsequently concluded.

(2) In this Article, "confidential information" means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party.

(3) A party who reasonably anticipates a breach of the duty may obtain a court order prohibiting it.

(4) A party who is in breach of the duty is liable for any loss caused by the breach and may be ordered to pay over to the other party any benefit obtained by the breach.

FS 28: Breach of confidentiality

(1) If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for that party's own purposes.

(2) A party who is in breach of the duty is liable for any loss caused to the other party by the breach and may be ordered to pay over to the other party any benefit obtained by the breach.

I. Introduction

1 **Confidentiality in commercial contracts.** Liability for breach of confidentiality has long been an element of the Common law (below, [7]) and has been acknowledged as a principle of transnational law with the publication of the first version of the PICC in 1994[1] (see below, [8]). Although issues of confidentiality were always closely related to the specific contexts of commercial contracts and arbitration, confidentiality has later become an element of the European

[1] PICC[1994] 2.16 was identical to the current PICC 2.1.16.

model rules, especially the PECL (with the amendments of part I in 2000)[2] and the DCFR.[3] Indeed, the national case laws on breach of confidentiality provide evidence that the problem is not confined to commercial circumstances.[4] It should be noted, however, that the concept of breach of confidentiality in transnational law is narrower than in many national laws, being confined to the disclosure and misuse of confidential information obtained during pre-contractual negotiations. This may explain, besides the exclusion of *culpa in contrahendo* from the scope of the instrument (above, Art 2: 301), why the CESL did not provide for any rule on confidentiality, even if such a rule might have been relevant in the b2b contracts envisaged by the instrument. Another reason for its exclusion from the CESL, has been the recent publication of a Directive 'on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure' by the European Union.[5] This Directive, for which a proposal had been published in November 2013, harmonizes the law of the member states as from June 2018. Information obtained in the course of negotiations is an important aspect, though not the central focus of the Directive (see Art 3 (3)), which more generally seeks to protect the holders of trade secrets against all forms of unlawful acquisition, use, and disclosure.

Duty or obligation? All provisions under review are nearly identical in their formulation, one exception being the legal characterization of the parties' commitment to confidentiality: whereas the PICC, PECL, PCC, the DCFR, and the FS speak of a 'duty' to respect confidentiality, the *Avant projet* uses the expression 'obligation' of confidentiality (the CESL does not provide for any provision on the issue).[6] In the European model rules, the term 'duty' typically refers to the framework of the contract and to the 'behavioural charter' applicable to the contracting parties, whereas 'obligation' seems more appropriate to describe the 'promised performance of a material or intellectual obligation'.[7] In view of this terminology, the wording of the majority of texts seems to accurately portray the legal nature; yet the relevance of this difference should not be overemphasized as a duty of confidentiality may become an obligation, if the parties agree on the confidential nature of information and determine sanctions to apply in cases of breach (below, [9]). 2

Definition of confidentiality. Generally speaking, confidentiality refers to information that is not meant to be in the public domain and is therefore not to be disclosed to third parties without the consent of the holder.[8] The term 'confidentiality' is close to the concept of confidence and privacy, but must not be confounded with these terms. First and foremost, confidence and 3

[2] Art 2:302 was not contained in the first part of the PECL published in 1995; it was only included in the revised version of part I published together with part II in 2000.

[3] On the relation between confidentiality on the one hand and commercial habits and arbitration on the other see Smeureanu, *Confidentiality in International Commercial Arbitration*, 1–5.

[4] On examples of breach of confidence in the national legal systems, see Gurry, *Breach of Confidence*, especially 89–109 (categories of confidential information).

[5] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

[6] Gandolfi, *Avant-projet*, Art 8: Obligation of confidentiality: '(1) The parties have the obligation to treat with circumspection any confidential information obtained during negotiations.

(2) Whichever party does not comply with this obligation shall compensate the other for any resulting loss, and if he has also drawn undue benefit from the confidential information he must recompense the other party to the extent of his own enrichment.'

[7] A Tenenbaum, 'Terminology', in Fauvarque-Cosson and Mazeaud, *European Contract Law*, 40 f.

[8] Gurry, *Breach of Confidence*, 4 f; Smeureanu, *Confidentiality in International Commercial Arbitration*, 5 f.

privacy are more general insofar as they cover a variety of situations that are characterized by a personal element, such as health, identity, or family. Confidentiality in these contexts is only a consequence of the personal character of information linked to intimate, familial, or personal affairs that are by their very nature not meant to be known to the public. With regard to the state, the protection of confidence and privacy is to be regarded as a human (or civil) right; hence, meaning public authorities must respect the privacy of private life.[9] In contrast, the notion of confidentiality in European private law is linked to negotiations between private parties. This implies that it also comprises information concerning legal persons and commercial or business secrets,[10] and that it is left to the parties to define which information is to be treated as confidential (below, [9]).

4 **Instances of potentially confidential information.** Due to the parties' power to define information as confidential, confidential information may concern technical, commercial, or industrial know-how, strategic choices, clients or suppliers or results of a due diligence investigation of the contracting partner.[11] These examples can be summarized under the heading 'trade secrets'.[12] Even if 'trade secrets' are the most common type of confidential information, the provisions cited are not restricted to these economic aspects, but might as well apply to personal data or other secrets of the parties involved in the negotiations.

5 **Policy considerations.** At first sight, the protection given to confidential information seems to hinder or restrict competition.[13] However, the economic analysis of unfair competition has shown that such restrictions are necessary to some extent to incentivize innovation, thereby effectively strengthening competition.[14] The protection of confidential information in the context of contractual relationships may complement the protection extended by intellectual property rights such as a patents or copyrights, especially before such absolute protection becomes effective. Thus, the protection of confidential information given in the course of contractual negotiations may be particularly important during the application process for intellectual property rights.[15]

II. Comparative overview

6 **Civil law countries.** Most civil law jurisdictions do not provide for special remedies where a party has suffered a breach of confidentiality.[16] In some countries, however, eg in Italy, special laws protect trade and industrial secrets;[17] in others, such as France, the protection of confidential information provided during negotiations has become a specific aspect of the law against

[9] Gurry, *Breach of Confidence*, 12 f ('personal confidences').

[10] On these differences see also von Bar, *Non-contractual Liability*, 2:205, Comment, [2].

[11] For a list see Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.31]. For typical content see Kurz, *Vertraulichkeitsvereinbarungen*, 27 f.

[12] Gurry, *Breach of Confidence*, 7 f.

[13] Gurry, *Breach of Confidence*, 9 f.

[14] On the economic analysis of competition see JE Stieglitz, 'The Meanings of Competition in Economic Analysis', (1992) 100 *Rivista Internazionale di Scienze Sociali* 191–212.

[15] See the French leading case Cass com, 77–10915, Bull civ 1978, No 208 (03.10.1978) 176, where the claimant had initiated a patent procedure; the Austrian leading case OGH 4 Ob 166/93 (22.03.1994) 552, where the slogan taken over by the defendant had not yet obtained protection by copyright.

[16] This may change after the implementation of the Trade Secrets Directive (above, fn 5) which is meant to harmonize the protection of trade secrets by June 9, 2018.

[17] A Musy, 'Case 12', in Cartwright and Hesselink, *Precontractual Liability*, 351 f.

unfair competition (*concurrence déloyale*).[18] Most legal systems, however, rely on the traditional instruments of tortious (delictual) and pre-contractual liability (*culpa in contrahendo*). Mostly, those instruments are regarded as sufficient to cover the disclosure of confidential information exchanged during pre-contractual negotiations.[19] It follows that the discussion in civil law on the nature of *culpa in contrahendo* as an instrument of contract law or the law of delict (above, before Art 2:301, [9]) is relevant also as far as the application of *culpa in contrahendo* to confidential information is concerned. Indeed, the problem of the nature of pre-contractual liability has been intensively discussed in German law. According to the prevailing opinion, know-how and other secrets are not protected as absolute intellectual property rights under § 823 I BGB unless its owner has been granted a formal intellectual property right;[20] hence liability depends on whether the other party was under an implied pre-contractual duty not to disclose information obtained during negotiations.[21]

Common law. A special remedy for the breach of confidentiality is acknowledged in the common law, where parties are held to be under a duty to act in accordance with good faith and fair dealing as far as confidential information is concerned.[22] The basis of this liability may be contractual, especially if the parties have explicitly agreed on the protection of confidential information; or it may be founded on equity.[23] It is a consequence of the strong influence of common law on the practice of international arbitration that the idea of confidentiality as an autonomous basis of liability has found its way into civil law. Moreover, the importance of know-how in the technological world and the digital revolution seem to stimulate the debate on confidential information in national, transnational, and international law. 7

III. Requirements and remedies

Outline. As explained above, the concept of confidentiality has its origins in international commercial contracts,[24] but has found its way into European contract law. By introducing liability for a breach of confidentiality, the transnational instruments are said to restate a special case of the general principle of good faith and fair dealing in pre-contractual negotiations.[25] It seems that the actual formulations of the transnational texts are a mixture of the common law idea of liability in equity for breach of confidence and the civilian idea of *culpa in contrahendo*.[26] 8

[18] The leading case for breach of confidentiality (in relation to pre-contractual negotiations) is still Cass com, 77–10915, Bull civ 1978, No 208 (03.10.1978) 176. The case involved an engineer who had invented a special procedure for the erection of concrete constructions. A company used the procedure known from negotiations with the engineer without enquiring whether the technical procedure was new or original. The court held the company liable in tort for misuse of confidential information. See also Cass civ, 12–25900, Bull civ I 2014, No 85 (13.05.2014).

[19] PECL 2:302, Note 1.

[20] On the discussion see *Münchener Kommentar*/Wagner, § 823, [282]–[286]; cf also C Ann, 'EU-Richtlinie zum Schutz vertraulichen Know-hows–Wann kommt das neue deutsche Recht, wie sieht es aus, was ist noch offen', (2016) *GRUR-Prax* 465–7, 466.

[21] BGH, (1961) *NJW* 1308 (17.03.1961); see *Münchener Kommentar*/Emmerich, § 311, [62]; *Münchener Kommentar*/Westermann, § 453, [37] f.

[22] *Seager v Copydex Ltd* [1967] 2 All ER 415; on the conditions see Gurry, *Breach of Confidence*, 25–35.

[23] On the relation between the two foundations, cf Gurry, *Breach of Confidence*, 39–42; Dal Pont, *Law of Confidentiality*, 258–60.

[24] Its original source in national laws seems to be the common laws' tort of breach of confidence; see von Bar, *Non-contractual Liability*, 2:205, Comment, [1].

[25] *Vogenauer*/Zuloaga Rios, Art 2.1.16, [1].

[26] For the good faith argument in Common law cf *Fraser v Evans* [1969] 1 QB 349, 361; for the three types of duty in pre-contractual relations in French law see Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.3].

As a consequence of this approach, liability for the breach of confidentiality is independent of 'whether or not a contract is subsequently concluded'.[27] Nevertheless, according to transnational authorities, liability should be the exception to the general principle of freedom of information.[28] It follows that courts will assume a duty to treat information as confidential which has been obtained during pre-contractual negotiations only under exceptional circumstances.[29]

1. Confidential information

9 **Confidentiality agreements.** An approach to protect confidential information is the conclusion of an explicit agreement to that effect. Such 'confidentiality' or 'non-disclosure agreements' are a common practice in international commercial contracts[30] and also in national transactions, especially in mergers and acquisitions.[31] Typically, such agreements define specific information as confidential and prohibit disclosure of the content thereof to third parties; moreover, they usually provide for penalties, compensation, or injunctions against the party violating its duty of non-disclosure. If the parties have come to an agreement on such terms, liability will be contractual in nature, even if the main contract has not come into existence or has later been avoided due to non-performance.[32] In contractual practice, confidentiality agreements usually set time limits. Thus, the other party will not be liable after a specific period of time has elapsed. Moreover, there can be no liability for the disclosure of information, once the information has become public, or has lost its secrecy as a result of events other than disclosure by the contracting party.[33]

10 **Implied duties of confidentiality.** Implied duties of confidentiality may arise in cases where the parties have not explicitly agreed on the confidentiality of information provided in the course of negotiations;[34] yet in such cases duties of non-disclosure may only be assumed under specific circumstances. Decisive aspects to consider in deciding whether information is confidential are: the nature of the information, the object of the contract, and all the expectations expressed by the parties during the negotiations.[35] Where there is doubt, it is necessary to balance both parties' interests.[36] Four criteria set out in *Thomas Marshall (Exports) Ltd v*

[27] Identical formulations in all three instruments; see PECL 2:302; PICC 2.1.16; PCC 2:103; DCFR II.-3:302 (1).

[28] PECL, Comment A; DCFR II.-3:302, Comment A; *Vogenauer*/Zuloaga Rios, Art 2.1.16, [8].

[29] PECL, Comment B; DCFR II.-3:302, Comment B; *Vogenauer*/Zuloaga Rios, Art 2.1.16, [9].

[30] For examples of such clauses, see Smeureanu, *Confidentiality in International Commercial Arbitration*, 9–14; a thorough analysis in Kurz, *Vertraulichkeitsvereinbarungen*, 19–61.

[31] On mergers and acquisitions see eg J Linke and M Fröhlich, 'Gestaltungsoptionen für Vertraulichkeitsvereinbarungen bei Unternehmenstransaktionen', (2014) *Gesellschafts- und Wirtschaftsrecht* 449–54.

[32] This solution has been adopted by the CISG, see CISG 81 (1): 'avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.' It must be applied also to confidentiality clauses, cf M Bridge, 'Art 81 CISG', in S Kröll, L Mistelis, and P Perales Viscasillas, *UN-Convention on the International Sales of Goods (CISG): Commentary* (2011) [8].

[33] cf Smeureanu, *Confidentiality in International Commercial Arbitration*, 165 f.

[34] The differentiation between absolute and relative confidentiality in von Bar, *Non-contractual Liability*, 2:205, Comment, [8] is not helpful in this respect, as it assumes that there is confidential information as such. The example given for absolute confidential information is two doctors suffering from AIDS. However, there may be situations where the information must be revealed despite its highly personal and hurtful nature, eg where a patients' health is at stake. Another connotation of these terms is in Y Derains, 'Evidence and Confidentiality', (2009) *International Chamber of Commerce International Court of Arbitration bulletin, Special Supplement* 57–71, 61.

[35] Examples in Smeureanu, *Confidentiality in International Commercial Arbitration*, 14–17, notably *Dolling Baker v Merret* [1990] 1 WLR 1205, where privacy of procedure is regarded as a ground for confidentiality. Illustrative is also a German case on ghost-writing (for the former chancellor Helmut Kohl), on which see Landgericht Köln, 114 O 315/14 (03.11.2014). The court found that by its very nature the contract on ghost-writing a biography included a confidentiality agreement.

[36] Examples of this balancing of interests can be found in national laws, see Dal Pont, *Law of Confidentiality*, 269 f.

Guinle[37] seem to be particularly helpful:[38] information is to be held as confidential, if firstly, the holder of the information believed that its release would cause damage to him or enable competitors to gain a financial advantage; secondly, that the information was not known to others; thirdly, that these two beliefs were reasonable; and finally, that the three criteria mentioned must be judged in light of the usages and practices of the relevant industry.[39] These criteria can be seen as applications of the general principle of good faith and fair dealing in pre-contractual negotiations. A slightly different definition of confidential information is used by DCFR II.-3:302 (2), according to which confidential information 'means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party.'[40] Yet, it must be stressed that the circumstances of the transmission of information cannot determine the nature of the piece of information itself; it can only be argued that under special circumstances the chosen type of communication can exclude the confidential nature of information.[41] The Comments to PCC 2:101 therefore emphasize that the confidentiality of the information may derive from the nature of the information, the other party's particular status, or from the object of the contract itself.[42] Whether the other party knew or ought to have known of the confidential nature is an aspect of the *breach* of confidentiality (below, [14]).

2. Breach of confidentiality

Independent discovery not covered. Under European private law, the rule on breach of confidentiality is restricted to cases where confidential information has been shared by one party in expectation of a future contract (above, [8]). This follows from the rule's foundation on the principle of good faith and fair dealing during negotiations. Indeed, the function of all provisions under review is to protect parties' reliance on the confidentiality of their contractual negotiations. Hence, where information has been independently obtained, or where a technological tool or commercial practice is the result of a parallel invention, its disclosure or use does not fall under the provision.[43] Even where information has been obtained in an illegitimate way, eg via criminal activity or espionage, Art 2:302 does not grant protection, if this has happened independently of contractual negotiations.[44] 11

Disclosure. Whereas the definition of confidential information depends on the interests of the 'owner', or holder, of the information, the act of infringement is primarily to be regarded from 12

[37] [1979] Ch 227.

[38] These criteria were cited with approval by the Irish Supreme Court in *House of Spring Gardens v Point Blank Ltd* [1984] IR 611, 663; R Friel, 'Case 12', in J Cartwright and M Hesselink, *Precontractual Liability*, 349 f.

[39] *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, 248.

[40] In the same vein see von Bar, *Non-contractual Liability*, 2:205: Loss upon breach of confidence: 'Loss caused to a person as a result of communication which, either from its nature or the circumstances in which it was obtained, the person communicating the information knows or could reasonably be expected to know is confidential to the person suffering the loss is legally relevant damage.'

[41] Eg 'blurting out information in public', on which see *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, as discussed in 'Confidential Communications: Case Note' (1969) 18 *International & Comparative Law Quarterly* 1016–17.

[42] B Fauvarque-Cosson and D Mazeaud, *Principes contractuels communs* (2008) 268: 'le caractère confidentiel de l'information peut se déduire de la nature même de cette information, inhérente au statut particulier du contractant ou de l'objet même du contrat' (for the English, see PCC).

[43] For the independent invention cf Gurry, *Breach of Confidence*, 111 f.

[44] Such cases are, however, covered by the Trade Secrets Directive (fn 5). On the special situations of negotiations see also Gurry, *Breach of Confidence*, 125 f. On the typical interests of parties disclosing certain information during pre-contractual negotiations, see Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, [9.31].

the infringer's perspective. All transnational instruments envisage two kinds of infringement of confidentiality: all instruments impose sanctions for the disclosure of confidential information to third parties on the one hand, and the use of the confidential information by the other party 'for its own purposes' on the other.[45] Disclosure comprises all forms of deliberate or negligent communication of the information by any means;[46] hence, the simple fact that the information disclosed was not intended to be known to third parties is sufficient for finding a breach of confidentiality.[47] In contrast, the question whether the self-serving use of confidential information is 'improper' and thus amounts to a breach of confidentiality depends on the nature of the information and the purpose for which it is used (below, [13]).

13 **Improper use of confidential information.** The use of confidential information 'for own purposes' is more difficult to define and largely depends on the circumstances of the individual case. The commentaries on the transnational instruments do not provide examples of typical cases of this kind of infringement.[48] Therefore, the case law of national courts must be consulted to determine the meaning of 'improper use' (PICC) or 'use for own purposes' (PECL, DCFR). The first case that comes to mind is the leading English case where the defendant applied for a patent in respect of a carpet grip that resembled the non-patented device that the claimant had created and revealed to the defendant during their negotiations.[49] Quite similarly, in the Austrian leading case, the defendant used a publicity slogan, developed by the claimant and disclosed during negotiations that had ultimately failed.[50] A comparable and recent French decision deals with a parental control system for the internet, invented by the claimant and copied–at least in part–by the defendant to whom the claimant had revealed the invention.[51] These examples illustrate that the misuse of confidential information does not substantially differ from its disclosure to third parties. In fact, in cases of misuse, the party does not disclose information to others but draws a direct and own advantage from the use of the entrusted information. This use can be called 'improper' or 'for its own purposes' insofar as it does not accord with the implied agreement on terms of which the information has been provided, and thus infringes, contrary to good faith and fair dealing, the rights and interests of the holder of the information.[52] Such abuse of confidential information is clearly apparent where the use of the confidential information benefits the infringer or where an advantage linked to the information is lost to its 'owner'. Thus, the question whether the information is protected as a property right is only one argument when weighing both parties' interests.[53] Of equal value may be personal rights or mere business interests that can equally be harmed by the improper use of the confidential information. In any event, detriment or harm on the side of the holder of the

[45] A variation in PICC 2.1.16 which speaks of 'improper use', on which see *Vogenauer*/Zuloaga Rios, Art 2.1.16, [17].

[46] See von Bar, *Non-contractual Liability*, 2:205, speaking of the infringement as 'communication'.

[47] See *Vogenauer*/Zuloaga Rios, Art 2.1.16, [16].

[48] An explanation is missing for PICC, see also *Vogenauer*/Zuloaga Rios, Art 2.1.16, [17].

[49] *Seager v Copydex Ltd* [1967] 2 All ER 415, on which see *Vogenauer*/Zuloaga Rios, Art 2.1.16, [17].

[50] OGH 4 Ob 166/93 (22.03.1994) 552.

[51] Cass civ, 12–25900, Bull civ I 2014, No 85 (13.05.2014).

[52] In English law, this argument is named 'springboard doctrine'. According to this doctrine, 'a person who obtains information in confidence must not use it for activities detrimental to the person who gave the confidential information', see *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, as discussed in 'Confidential Communications: Case Note' (fn 41) 1016.

[53] See, for the German discussion, *Münchener Kommentar*/Wagner, § 823, [282]–[286]; S Lorenz & W Vogelsang, 'Case 12', in J Cartwright and M Hesselink, *Precontractual Liability*, 346 f. Lorenz and Vogelsang make clear that the other party may nevertheless be liable on the basis of *culpa in contrahendo* even if a claim on the basis of the law of delict is denied.

information is not necessary, since improper use may lead to an enrichment of the other party without measurable harm on the holder's side (below, [18]).[54]

Knowledge or negligence. Liability presupposes that the other party disclosing or improperly using confidential information which has been obtained during negotiations was aware of the confidentiality of the information or was at least negligent with regard to its confidentiality.[55] This subjective criterion is not explicitly mentioned in the non-legislative codifications, but derives from the foundation of the duty to confidentiality in good faith and fair dealing (see above, Art 2:301 Negotiations contrary to good faith, [13]–[21]). In fact, an infringement of the duty of confidentiality can only be contrary to good faith if the other party can be blamed for not taking into account the other party's interests that it knew or should have known of. 14

Justification of disclosure or use of confidential information. Under exceptional circumstances, the disclosure, or even the use, of confidential information can be regarded as justified or excused, so that the party disclosing or using the information incurs no liability. The most important examples are legal provisions prescribing disclosure for the sake of an overriding public interest.[56] Indeed, the most frequently discussed excuse for the disclosure of confidential information concerned cases where the other party prepared litigation or brought an action which made it necessary to share confidential information with legal advisers or with the courts.[57] In such cases, the claimant's interest in bringing proceedings is regularly considered to outweigh the other party's interest in the protection of confidentiality of the information given (disclosure in the interest of justice). One can, however, imagine that the disclosure of confidential information in court or to a lawyer might nevertheless constitute a breach of confidentiality where such disclosure is not helpful or not strictly necessary for the outcome of the case. Moreover, in recent times, spectacular cases have raised attention to the problem of whistleblowing, which has now been explicitly regulated in Art 5 of the Trade Secrets Directive.[58] 15

3. Remedies

Causation. The non-legislative codifications provide for the compensation of losses and for the restitution of benefits received; moreover, DCFR II.-3:302 (3) mentions the injunctions ('court order') which may indeed be necessary to prevent future breaches of the duty of confidence (below, [19]). Even if not expressly stated by the PECL and in the PICC, though in DCFR II.-3:302 (4), it is evident that all those remedies require causation:[59] the losses of one party must have been caused by the breach of confidentiality of the other; the benefit of the responsible party must derive from its breach. In the same vein, prohibitory injunctions will only be granted if harm can be predicted with relative certainty; thus, causation must be plausible.[60] 16

[54] This is a different from the common law approach according to which proof of any detriment suffered by a person or entity is necessary, see Dal Pont, *Law of Confidentiality*, 264 f.

[55] See Dal Pont, *Law of Confidentiality*, 267 f (for remedy in equity).

[56] Examples in Smeureanu, *Confidentiality in International Commercial Arbitration*, 114–21.

[57] 'Disclosure in the Interest of Justice', on which see Smeureanu, *Confidentiality in International Commercial Arbitration*, 122–5.

[58] See above, fn 5. On the right to disclosure in Great Britain see D Lewis, 'Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected', (2008) 82 *Journal of Business Ethics* 497–507.

[59] Fauvarque-Cosson and Mazeaud (fn 42) 269: 'l'effectivité de ce droit à la reparation demeure néanmoins subordonnée à la preuve du lien de causalité entre le manquement au devoir de confidentialité et le prejudice souffert par l'une des parties' (for the English, see PCC).

[60] This condition derives from national laws, on which see Beatson, Burrows, and Cartwright, *Anson*, 615 f.

17 **Compensation of loss.** Quite clearly, the disclosure or misuse of confidential information may infringe the rights of the other party. All loss that has been caused by the breach of confidentiality must therefore be compensated.[61] Compensation comprises all harm caused to the party's interests and rights, eg loss of credit (and the need to pay more for a loan of money), loss of reputation (and the market's turning to competitors), loss of a contract with third parties (if it can be clearly proven that these parties were about to conclude contracts with the other party when the information was disclosed to them).[62] Punitive damages to discourage the use of trade secrets, although acknowledged in some jurisdictions, are not recognized under European private law.[63]

18 **Restitution.** Confidential information may have a commercial value.[64] If the advantage linked to the information is shifted from the holder of the information to the party disclosing or misusing it, the enriched party is held liable on the basis of unjustified enrichment; hence, it has to pay the value of the gain obtained by the disclosure or misuse of the information.[65] Thus, all texts agree that the sanctions for breach of confidentiality are not limited to the compensation of damage but also include restitution of the benefit received by the other party.[66] This remedy is traditionally referred to as 'restitution'.[67] Although such a remedy is not acknowledged in all European jurisdictions, the Comments on the DCFR argue that it should be granted in analogy to the remedies available for an infringement of intellectual property rights.[68] Moreover, it has been acknowledged in jurisdictions like Germany, in which such an analogy is deemed implausible.[69]

19 **Injunctions.** Only DCFR II.-3:302 (3) mentions the possibility of raising an action for injunction ('court order') against the disclosure or the use of confidential information. Nevertheless, this remedy seems to be generally acknowledged under national laws and in transnational legal practice.[70] The procedure and the conditions depend on national laws as the transnational texts do not specify procedural rules.

20 **Free choice among different remedies.** The holder of the information shall have the choice among the three remedies;[71] moreover, an injunction may be granted in addition to a claim for damages or restitution.

61 *Vogenauer*/Zuloaga Rios, Art 2.1.16, [18].

62 DFCR II.-3:302, Comment C.

63 For Sweden see C Ramberg & J Herre, 'Case 12', in J Cartwright and M Hesselink, *Precontractual Liability*, 358 f.

64 *Vogenauer*/Zuloaga Rios, Art 2.1.16, [19].

65 On enrichment see PECL 2:302, Note 2.

66 The best example is case OGH 4 Ob 166/93 (22.03.1994) 552, that gave a 'claim for misappropriation' (*Verwendungsanspruch*) which is an application of 'unjust enrichment', for the use of a slogan invented by the other party during the negotiations ('Wienerwald II').

67 PECL 15:104, although a general provision on unjustified enrichment has been avoided in the PECL, see C von Bar & S Swann (eds), *Principles of European Law: Unjustified Enrichment (PEL Unj. Enr.)* (2010) [134].

68 DCFR II.-3:302, Comment C.

69 For references, see above, fn 20. Nevertheless, such a remedy may be granted unter § 285 BGB.

70 For the remedy of injunctions missing in the PICC, see *Vogenauer*/Zuloaga Rios, Art 2.1.16, [21].

71 For free choice see also *Vogenauer*/Zuloaga Rios, Art 2.1.16, [22].